80-116

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No.

OCTOBER TERM, 1979

MATTER OF ANGELO DARRIGO,

Petitioner-Appellant,

-against-

STATE COMMISSION ON JUDICIAL CONDUCT, the HON. MRS. GENE ROBB, CHAIRPERSON, the HON. GERALD STERN, ADMINISTRATOR, and the HON. FRANCIS L. VALENTE, JR., REFEREE, and THE SEVERAL OTHER MEMBERS OF THE NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT AS IT CURRENTLY EXISTS PURSUANT TO THE CONSTITUTION OF THE STATE OF NEW YORK, ART. 6, SECT. 22, AND THE JUDICIARY LAW OF THE STATE OF NEW YORK, SECTS. 40-48,

Respondents-Appellees,

ON APPEAL FROM APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

JURISDICTIONAL STATEMENT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No.

MATTER OF ANGELO DARRIGO,

Petitioner-Appellant,

-against-

STATE COMMISSION ON JUDICIAL CONDUCT, the HON. MRS. GENE ROBB, CHAIRPERSON, the HON. GERALD STERN, ADMINISTRATOR, and the HON. FRANCIS L. VALENTE, JR., REFEREE, and THE SEVERAL OTHER MEMBERS OF THE NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT AS IT CURRENTLY EXISTS PURSUANT TO THE CONSTITUTION OF THE STATE OF NEW YORK, ART. 6, SECT. 22, AND THE JUDICIARY LAW OF THE STATE OF NEW YORK, SECTS. 40-48,

Respondents-Appellees.

ON APPEAL FROM APPELLATE DIVISION,
SUPREME COURT OF NEW YORK,
FIRST JUDICIAL DEPARTMENT

JURISDICTIONAL STATEMENT

QUESTIONS PRESENTED

1. Is the combination of powers vested in the New York State Commission on Judicial Conduct to investigate, prosecute and adjudicate with respect to

proceedings which are within its jurisdiction violative of the Federal Due Process clause substantively and as applied?[1]

2. Is Section 22, Article 6 of the New York State Constitution and Subd. 4, Section 44 of the Judiciary Law of the State of New York violative of Federal Due Process in failing to set forth *any* standard as to what is required in order for the New York State Commission on Judicial Conduct to lodge 'Formal Written Charges' against a member of the judiciary of that State?

3. Were the provisions of law in effect on May 25, 1977 empowering the former New York State Commission on Judicial Conduct to file Administrator's Complaints under former Subd. 2, Sect. 43 of the Judiciary Law of the State of New York violative of Federal Due Process in failing to have *any* standard as to what is required in order to file such a complaint?

4. Do the provisions of Subd. c, Sect. 22, Art. 6 of the New York State Constitution and Subd. 2, Sect. 43 of the Judiciary Law of the State of New York authorizing a Referee to conduct the hearings held upon Formal Written Charges violate Federal Due Process of law substantively and as applied?

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1. The parties to the proceedings whose judgment is sought to be reviewed by this Court are basically contained in the caption of this matter. Specifically they are as follows: Angelo Darrigo, Town Justice of the Town of Newburgh, County of Orange, State of New York, Petitioner-Appellant; New York State Commission on Judicial Conduct, 801 Second Avenue, New York, New York 10017; Hon. Mrs. Gene Robb, Chairperson, 801 Second Avenue, New York, New York 10017; The Hon. Gerald Stern, Administrator of the New York State Commission on Judicial Conduct, 801 Second Avenue, New York, New York 10017; Hon. Francis L. Valente, Jr., Referee, 535 Fifth Avenue, New York, New York 10017; and the Several Other Members of the New York State Commission on Judicial Conduct, 801 Second Avenue, New York, New York 10017; Attorney General of the State of New York by Assistant Solicitor General, Daniel M. Cohen, 2 World Trade Center, New York, New York has been served with all documents since the inception of these proceedings in the State Courts however the Attorney General of the State of New York thus far has declined to intervene and has left the defense of these proceedings to the New York State Commission on Judicial Conduct.

5. Did the Courts below condone an illegal investigation of the Petitioner-Appellant by the New York State Commission on Judicial Conduct by holding that the New York State Commission on Judicial Conduct could file additional Administrator's Complaints against him with respect to matters it uncovered during an outrageous roving inquiry?

OPINIONS BELOW

No opinions below were officially or unofficially reported. This special proceeding was commenced in the Supreme Court of the State of New York, County of New York which Court rendered an opinion (N.O.R., NYLJ, June 7, 1979, p. 10, col. 3) and issued an Order and Judgment (one paper) entered on July 3, 1979. Thereafter an appeal, as of right, was taken to the Appellate Division, Supreme Court of New York, First Judicial Department which Court, in a decision slip, unanimously affirmed by an Order entered March 20, 1980 the Order and Judgment of Special Term (—AD2d—). Thereafter, a motion was made to the Appellate Division Supreme Court of New York, First Judicial Department requesting permission to appeal to the New York State Court of Appeals which motion was denied by an Order entered on April 29, 1980 (—AD2d—). Thereafter the Petitioner-Appellant filed a Notice of Appeal as of right appealing to the New York State Court of Appeals and further filed an application seeking from that Court permission to appeal to that Court. The New York State Court of Appeals by an Order entered on July 3, 1980 denied the Petitioner-Appellant's application for permission to appeal to that Court and granted a cross motion made by the Respondents-Appellees and dismissed the Petitioner-Appellant's appeal filed as of right on the ground that no substantial constitutional question was directly involved (—NY2d—).

JURISDICTION OF THIS COURT IS INVOLVED UNDER 28 U.S.C. 1257(2)[2]

The nature of this proceeding is *inter alia* a declaratory judgment action to have Article 6, Section 22 of the Constitution of New York State declared to be violative of the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. In addition, this special proceeding sought a declaratory judgment to the effect that the Judiciary Law of the State of New York, Sections 40-48 were also violative of the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution substantively and as applied.

It is sought on this appeal to have the Order entered on March 20, 1980 in the Appellate Division, Supreme Court of New York, First Judicial Department unanimously affirming an Order and Judgment (one paper) of the Supreme Court of the State of New York entered July 3, 1979 reviewed. All applications for permission to appeal to the New York State Court of Appeals were denied and the Petitioner-Appellant's Notice of Appeal filed with that Court on March 21, 1980 was dismissed by that Court any an Order entered July 3, 1980. Thereafter, the Petitioner-Appellant, pursuant to 28 U.S.C. 1257(2) filed, as of right, a Notice of Appeal in the Appellate Division, Supreme Court of New York, First Judicial Department on July 8, 1980 appealing to this Court.

It is the Petitioner-Appellant's contention that the jurisdiction of this Court is properly invoked under 28 U.S.C. 1257(2) in that it is his contention that the cur-

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2. It is requested that should this Court hold that no substantial constitutional question is directly involved that it, pursuant to 28 U.S.C. Sect. 2103 regard the within Jurisdictional Statement as a Petition for a Writ of Certiorari. It is specifically requested that in accordance with Rule 45, Subd. a of the Rules of this Court that the Petitioner-Appellant be permitted oral argument with regard to this Jurisdictional Statement.

rent New York State Constitution, Article 6, Section 22 is repugnant to the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. It is also his contention that this Court's jurisdiction is properly invoked in that it is his claim that the Judiciary Law of the State of New York, Sections 40-48 are repugnant to the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Should this Court determine that that basis for jurisdiction is improvidently relied upon by the Petitioner-Appellant, it is requested that this Jurisdictional Statement be treated as a Petition for a Writ of Certiorari to be issued to the Appellate Division, Supreme Court of New York First Judiciary Department (28 U.S.C. 2103).

NEW YORK STATE CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

A. New York State Constitution, Article 6, Section 22, (McKinney's 1979-1980, Supp.).

B. Judiciary Law of the State of New York, Sections 40, 41, 42, 43, 44, 45, 46, 47, 48, (McKinney's 1979-1980, Supp.).

C. Judiciary Law of the State of New York, Section 43, Subd. 2, as in effect on May 25, 1977 (McKinney's, 1977-1978, Supp.).

(All such constitutional provisions and statutes are contained in the Appendix to this Jurisdictional Statement.)

STATEMENT OF FACTS

Petitioner-Appellant, one of the Town Justices of the Town of Newburgh Justice Court, County of Orange, State of New York, on September 8, 1975, on court stationery, wrote a letter to Town Justice Walter Gersten of the Town of Thompson Justice Court,

Sullivan County, State of New York, advising him that Joseph Catania, a defendant before that Justice Court upon a Uniform Traffic Ticket,[3] was his neighbor, and any consideration which could be given to Catania would be appreciated. That letter came to the attention of the staff of the then existing New York State Commission on Judicial Conduct.

On April 22, 1977, an unnumbered Administrator's Complaint concerning itself *solely* with Petitioner-Appellant's letter of September 8, 1975 was drafted. This proposed Administrator's Complaint was to be presented to the full then existing New York State Commission on Judicial Conduct so that it could determine within its absolute discretion whether or not to, *on its own motion, direct its Administrator to sign its complaint and thereafter file its complaint in accordance with then existing Subdivision 2, Section 43 of the Judiciary Law of the State of New york so that the New York State Commission on Judicial Conduct would have a statutory basis upon which to investigate its Administrator's Complaint.*

The proposed Administrator's Complaint was formally before the New York State Commission on Judicial Conduct on May 25, 1977, and upon a motion they may or may not have had a discussion concerning it with regard to the Petitioner-Appellant. No record of the vote of action taken was kept. However, the vote was either a consensus or unanimous to *'investigate'* The New York State Commission on Judicial Conduct has no rule that tally sheets of its voting record be kept. The Administrator is present at its monthly

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3. This letter was sent by the Petitioner-Appellant *after* the defendant Catania had entered a plea of guilty to this summons, which was issued for a violation of Vehicle & Traffic Law Section 1180, speeding. The Petitioner-Appellant mailed the latter so that Catania might not have to drive approximately 50 miles to the Town of Thompson merely to pay a fine. The Petitioner-Appellant never inquired as to what eventually happened with regard to that summons.

meetings and keeps the minutes, which minutes are then, at a later date, approved by the Commission. It seems also that in the Petitioner-Appellant's case there was no Initial Review and Inquiry with regard to the Administrator's Complaint, in accordance with the then existing Commission Rule 22 NYCRR 7000.2(k) before the investigation of the Petitioner-Appellant was undertaken by the New York State Commission on Judicial Conduct.

After May 25, 1977 meeting the Commission filed an Administrator's Complaint drafted pursuant to then existing Subdivision 2, Section 43, of the Judiciary Law of the State of New York, which in a non-evidentiary form read as follows:

"Complaint

Judge Darrigo wrote a letter on his official stationery on September 8, 1975 to Judge Walter Gersten of Thompson Town Court. He sought consideration on the disposal of a traffic ticket to a defendant (Joseph Catania) who was his neighbor. The letter was intended to influence Judge Gersten in the disposition of this case on the basis of personal consideration. It was in breach of Sections 33.2(b)(c) and 33.3(a)(4) of the Rules of the Administrative Board of the Judicial Conference of the State of New York.

New York, N.Y.
April 22, 1977 Gerald Stern, Administrator"

Shortly after this event investigators, employed by the Commission, went to the courthouse where the Petitioner-Appellant presides and went through *"All* of the files on Judge Darrigo ****" and photocopied numerous documents. At the time that Commission investigators thoroughly rifled through all of the public court records on file at this Town Justice Court, they did not advise the Petitioner-Appellant why they were *investigating him,* nor did they inform the Petitioner-Appellant that an Administrator's Complaint had been

filed and lodged with regard to his alleged conduct in the Catania case.

On July 12, 1977, on New York State Commission on Judicial Conduct stationery, the Respondent-Appellee Administrator wrote to the Petitioner-Appellant advising him that the "Commission" *requested* that within ten days he explain why he granted favorable dispositions in the cases of *People v. Didea; People v. Russo; People v. Catania;* and *People v. Saracino,* following a request from a third party. The Petitioner-Appellant was also requested to explain the facts surrounding his having requested favorable dispositions from other Judges in the cases of *People v. Woolsey; People v. Coisson; People v. Crystal; People v. Diller; People v. McCormick; People v. McGrath; People v. Farrett* and *People v. Liguor.* He was also to advise "the Commission" of any other similar requests made to him or that he made to any other Judge and what his relationship to the above named defendants was, whether any of them were clients of his law practice, and whether he charged any of them a fee with regard to any of these matters. Petitioner-Appellant, in a two-page letter, complied with the Commission's request and set forth the facts and circumstances concerning his presiding in those cases.

A second letter on Commission stationery was written by the Respondent-Appellee Administrator to Petitioner-Appellant thanking him for his prompt reply to the previous letter and advising him that additional cases had come to the attention of "the Commission" where the Petitioner-Appellant appeared to have given favorable dispositions to defendants at the request of third persons, or where favorable dispositions had been obtained by reason of the Petitioner-Appellant having intervened with other Judges with regard to cases pending before them. The Petitioner-Appellant was again asked if he had ever represented certain

named defendants who had been referred to in the earlier letter from the Administrator. He was also accused by this letter of having given favorable dispositions to clients or former clients or their immediate relatives with regard to certain cases pending before the Justice Court where he presides.

The second "Commission letter" further advised the Petitioner-Appellant that he was requested to reply to it within ten days. Still Petitioner-Appellant had not yet been informed that an Administrator's Complaint had been purportedly filed against him with regard to the Catania case, but nevertheless he answered this letter, which concerned itself with the following seventeen cases, among other things: *People v. Robert Birkhead; People v. Charles Levinson; People v. Joseph Nocera; People v. James Spiconardi; People v. Samuel Whittington; People v. Marcos Farciett; People v. Ronald Luino; People v. William Sangater; People v. Cohen Tart; People v. Robert Bennett; People v. Vincent Forestiere, Jr.; People v. Michael Hubyck; People v. Amy Osusky; People v. David Sager; People v. Julian Rodriguez; People v. Ann Schuyler; People v. Paul Schuyler.*

Seven months later, on New York State Commission on Judicial Conduct stationery, the Respondent-Appellee Administrator, on July 12, 1978, advised the Petitioner-Appellant that "the Commission" requested his appearance before a panel of members of the Commission at 2:00 P.M. on June 28, 1978 to be questioned with regard to the following:

> "1. The Commission will question you concerning your role in the disposition of the following cases: *People v. Joseph A. Catania,* 1975; *People v. Dorothy Catania,* May 9, 1975; *People v. Beverly A. Catania,* March 18, 1977; *People v. Charles DiDea, July*

1, 1976; *People v. Isabella Russo,* March 20, 1975; *People v. Raymond Saracino,* February 20, 1973; *People v. Marcus Farciett,* July 25, 1974; *People v. Ronald F. Luino,* November 10, 1975; *People v. William Sangater,* October 17, 1974; *People v. Cohen Tart,* March 19, 1975.

2. You will also be questioned about communications received from third parties in the following cases you disposed of in your own court: *People v. Theron Woolsey,* October 17, 1975; *People v. Robert Coisson,* September 3, 1976; *People v. Matthew Chrystal,* July 11, 1975; *People v. Edward Diller,* May 3, 1974; *People v. Dennis McCormick,* March 22, 1974; *People v. Kathleen McGrath,* November 11, 1974; *People v. John Farrett,* November 29, 1974; *People v. William Liguor,* May 3, 1974; *People v. Robert Birkhead,* October 17, 1975; *People v. Charles Levinson,* July 12, 1974; *People v. Joseph Nocera,* March 7, 1974; *People v. Charles Levinson,* August 8, 1975; *People v. James Spiconardi,* November 29, 1974; *People v. Samuel Whittington,* April 4, 1975.

3. You will also be questioned about your disposition of the following cases, where the defendants appear to have been your clients or relatives of your clients: *People v. Robert Bennett,* March 28, 1975; *People v. V.A. Forestiere,* November 1, 1974; *People v. Michael Hubych,* January 17, 1974; *People v. Amy Osusky,* August 15, 1969;[4] *People v. David Sager,* July 25, 1975; *People v. Julian Rodriguez* (adjudicated November 10, 1970); *People v. Paul Schuyler,* September 1, 1972; *People v. Ann Schuyler,* November 12, 1971; *People v. Wayne Winkler,* June 3, 1974; *People v. Denise Martinisi,* March 19, 1976; *People v. Nicolene Martinisi,* August 10, 1976; *People v. Donna Karassik,* March 30, 1976; *People v. Edward Riglioni, Jr.,* March 4, 1977; *People v. Michele Caston,* May 3, 1974.

4. You will also be questioned about your disposition of the following case: People v. Audrey Hollard,

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4. These investigations sought to go back as far as 1969!

November 29, 1975." (Dates following cases indicate the return date.)

This Commission letter further informed the Petitioner-Appellant that "THIS IS AN INVESTIGATION, NOT AN ADVERSARY HEARING." (Capitalization and italics added for emphasis). The Petitioner-Appellant was further informed in this letter that a copy of the Administrator's Complaint which "* * * initiated this investigation pursuant to Section 43, Subdivision 2 of the former Judiciary Law of the State of New York [was] enclosed."

On June 22, 1978, Petitioner-Appellant, after receiving the June 12, 1978 letter and its numerous enclosures, wrote to the Respondent-Appellee Administrator requesting a copy of the rules and procedures of the New York State Commission on Judicial Conduct then in effect, stating that "in view of what has been transpiring throughout the State [he was] somewhat reluctant to *voluntarily* (italics added for emphasis) appear unless [he was advised] what rules and procedures [would] be applicable." The Respondent-Appellee Administrator replied on New York State Commission on Judicial Conduct stationery, that "the New York State Commission on Judicial Conduct has not promulgated rules and procedures to date." "* * * and in the interim the Commission cannot delay completion of its investigations."

On June 28, 1978 Petitioner-Appellant failed to appear before a panel of members of the New York State Commission on Judicial Conduct. On June 28, 1978, on New York State Commission on Judicial Conduct stationery, the Respondent-Appellee Administrator advised the Petitioner-Appellant that his failure to appear before a member of the Commission had been noted on the record and would be reported to "the Commission." The Respondent-Appellee Administrator further informed the Petitioner-Appellant that he would be *required* to appear before a member of the Commission at 1:00 P.M. on July 18, 1978

"* * * under the same conditions and on the same subject matter * * *" as had been requested previously. This direction to appear was made by "the Commission" purportedly pursuant to Subdivision 3, Section 44, of the New York State Judiciary Law.

On July 18, 1978 Petitioner-Appellant again failed to appear as directed before a member of the New York State Commission on Judicial Conduct. Again on New York State Commission on Judicial Conduct stationery, by a letter dated July 18, 1978 the Respondent-Appellee Administrator advised the Petitioner-Appellant that because of his failure to appear on two occasions before the Commission, the Commission would be asked to take disciplinary action against him. The Petitioner-Appellant was again, on the authority of Subdivision 3, Section 44 of the New York State Judiciary Law, requested to appear at the Commission's office in New York City at 10:00 A.M. on July 28, 1978 so that he could be asked questions "* * * on the complaint and related materials previously sent * * *" to him, that is, concerning the thirty-nine cases earlier referred to in this Jurisdictional Statement. The Petitioner-Appellant was further advised by this letter that his "* * * refusal to [appear] may constitute lack of cooperation in a duly authorized investigation."

On July 27, 1978, for the third time, Petitioner-Appellant failed to appear, having previously advised a staff attorney of the Commission that he would not be coming down to New York City.

Due to Petitioner-Appellant's repeated failure to appear before a member or panel of Commission members as directed, the New York State Commission on Judicial Conduct on September 20, 1978 filed Formal Written Charges against him containing four charges which *inter alia* accused him of judicial misconduct in having violated the rules governing judicial conduct of the Administrative Board of the

Judicial Conference of the State of New York and the Code of Judicial Conduct of the State of New York.

After being served with the Formal Written Complaint, Petitioner-Appellant interposed a verified written answer which denied all of the allegations of wrongdoing and set forth four affirmative defenses.

The Respondent-Appellee Francis L. Valente, Jr. was, by an order of the Commission, appointed to act as Referee to hear and report to the Commission findings of fact and conclusions of law concerning the charges contained in the Formal Written Complaint.

While the hearing upon formal written charges was taking place before the Respondent-Appellee Referee, an Article 78 proceeding was commenced. In his original Petition, filed in support of that special proceeding, Petitioner-Appellant argued that the proceedings he was being subjected to before the New York State Commission on Judicial Conduct and its Referee, as currently controlled by Section 22, Article 6 of the New York State Constitution and Section 40-48 of the Judiciary Law of the State of New York provides for a combination of powers which are impermissibly broad in that this Commission was authorized to investigate, prosecute and adjudicate with respect to any matters which came within its jurisdiction.

He also raised the contention in his original Article 78 proceeding that a Writ in the Nature of Prohibition should be granted because the New York State Commission on Judicial Conduct was acting in excess of its subject matter jurisdiction when it directed the Petitioner-Appellant to appear before it with respect to, among other things, thirty-eight cases, none of which had on file an Administrator's Complaint, claiming that by reason of the Commission's failure to file and serve a complaint with regard to these other matter, it was not duly authorized to investigate these matters, inasmuch as it had no *basis* upon which to investigate those cases, much less investigate the

Petitioner-Appellant with regard to his actions as a Town Justice and lawyer *for the past nine years.* He also raised other questions which are not germaine to this proceeding.

A motion to dismiss was made by the Respondent-Appellee Administrator where he claimed that the Petitioner-Appellant failed to state a cause of action. Upon his motion to dismiss, the Respondent-Appellee Administrator argued that the Court at Special Term should not "* * * interfere with a pending *administrative proceeding*"[5] especially where there was a right of direct review of both questions of fact and conclusions of law as determined by the Commission to the Court of Appeals.

Upon receipt of the Respondent-Appellee Administrator's appearance and motion to dismiss, Petitioner-Appellant, although he could have, as of right, amended his Petition, filed a Cross Notice of Motion seeking an order amending his Petition to include a claim that former Section 42 of the Judiciary Law of the State of New York, Section 22, Article 6 of the New York State Constitution and Section 44 of the present Judiciary law of the State of New York are so vague and ambiguous as to what is legally required before the New York State Commission on Judicial Conduct may file an Administrator's Complaint as to

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5. Although the Respondent-Appellee Administrator styles proceedings which take place before the New York State Commission on Judicial Conduct as Administrative, [the Court at Special Term accepted that argument], see generally *Corkum v. Bartlett* (46 NY2d 424 [*per curiam* opinion] [Ch. J. Cooke taking no part]), it will be strenuously argued in this Court that they are not Administrative proceedings, but something in the nature of a proceeding before a newly created fourth branch of New York State government which could aptly be referred to as 'Big Brother Branch' (cf. *In re Grand Jury Witness, Margaret Ann Heutsche v. United States of America,* 414 U.S. 844 [App. for Bail Pending Pet. for Cert. Den. Douglas J. Dissenting]). See also, in particular, in theory and in concept, dissenting opinion of Mr. Justice Wiliam O. Douglas in *California Bankers Association v. Shultz* (416 U.S. 21, 78-90).

be violative of Federal due process, declaring these provisions unconstitutional. A further amendment was sought to include a claim that the current New York State Judiciary Law, Subdivision 4, Section 44 and Section 22, Article 6 of the New York State Constitution are so vague and ambiguous as to what is required before the New York State Commission on Judicial Conduct may file 'formal written charges' against a member of the Judiciary as to be violative of Federal due process.

Petitioner-Appellant lastly sought to amend the Petition so as to contain a claim that Section 22, Article 6 of the New York State Constitution and the current New York State Judiciary Law to the extent that they permit hearings on formal written charges to take place before a Referee violated Federal due process.

The Court at Special Term consolidated all of the proceedings before it for disposition and thereafter dismissed the Petition as it pertained to the four Federal constitutional contentions raised. Special Term held that absent a clear showing of actual bias, a combination of investigative, prosecutional and judicial functions in a single administrative agency did not violate due process, citing *Withrow v. Larkin,* (421 U.S. 35, 47); *Hortonville School District #1 v. Hortonville Ed. Assn.* (426 U.S. 82); and *F.T.C. v. Cement Institute,* (333 U.S. 683). With regard to Petitioner-Appellant's claim of lack of State constitutional or statutory standards or guidelines as to what is required before an Administrator's Complaint could be filed or formal written charges could be brought against a member of the Judiciary, Special Term held that the phrase "for cause" as the basis for any Commission *sanction* under New York State Judiciary Law, Section 44, Subdivision 1 was not void for vagueness citing *Friedman v. State of New York* (24 NY2d 528) Appeal Dismissed, (397 U.S. 317) and *Sarisohn v. Appellate*

Division (265 F. Supp. 455, 458) so long as the investigation *which follows* the filing of a complaint is related to a member of the Judiciary's conduct, qualifications, fitness to perform or performance of his official duties. Special Term further held that Petitioner-Appellant's Federal constitutional objections directed toward New York State's constitutional and statutory provisions allowing for a reference of the hearing upon formal written charges as being without merit, citing *Matter of Waltemade,* (37 NY2d nn).

An appeal and cross appeal was taken to the Appellate Division, Supreme Court of New York, First Judicial Department and the Petitioner-Appellant raised, among others, the following contentions:

I. The combination of powers vested in the State Commission on Judicia Conduct combining investigation, prosecution and adjudication with respect to proceedings which are within its jurisdiction is violative of Federal due process substantively and as applied.

II. Section 22, Article 6, of the New York State Constitution and Subdivision 4, Section 44, of the Judiciary Law of the State of New York violate Federal due process in failing to set forth any standard as to what is required in order for the New York State Commission on Judicial Conduct to bring formal written charges against a Judge.

III. The provisions of law in effect on May 25, 1977 empowering the then existing New York State Commission on Judicial Conduct to file Administrator's complaints under Subdivision 2, Section 43 of the New York State Judiciary Law were violative of Federal due process in failing to set forth *any* standards as to what was required in order to file such complaints to act as the basis for an investigation.

IV. The provisions of Subdivision c, Section 22, Article 6 of the New York State Constitution and Subdivision 2, Section 43 of the Judiciary Law of the State

of New York which provide for the designation of a Referee to hear and report on hearings which are held pursuant to Section 44 of the New York State Judiciary Law upon formal written charges violates a Respondent's Federal due process of law in not affording him the process due.

V. To the extent that Special Term held that the Commission could file Administrator's complaints with respect to matters it uncovered as a result of its illegal investigation of the Petitioner-Appellant, it was condoning illegal Commission investigation tactics.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL AND REQUIRE PLENARY CONSIDERATION ON THEIR MERITS BY THIS COURT

This case truly presents a legal question which represents the quintessence of law. Can a State create a Commission to oversee its Judges and Justices which Commission possesses the power to act as a single functionary to investigate, charge and remove. This Court has never considered that question, although it has pointed out that there is no higher State interest than the quality of its Judiciary, *Landmark Communications, Inc. v. Commonwealth of Virginia* (—U.S.—, 98 S. Ct., 1535). While during the 200 years prior to the creation of a Commission to oversee the Judiciary in the State of New York very few members of the judiciary were ever brought under scrutiny with regard to their behavior, since the creation of the former Temporary Commission on Judicial Conduct, the former Commission on Judicial Conduct and the current Commission, in excess of 1200 Judges[6] have been investigated, many members of the judiciary have been penalized in one fashion or another

6. There are approximately 3500 members of the Unified Court System in New York.

and there also has been a large number of resignations by various judges who have come under investigation.

It is also apparent that these State Commissions on Judicial Conduct are acting as if they are the public's protector against possible and potential judicial misconduct or corruption, and have not limited themselves to merely investigating specific instances of alleged judicial misconduct. They are monitoring all of the courts in the State of New York and have turned themselves into every judge's and justice's 'Big Brother.'

As indicated in the *First Report of the Temporary State Commission on Judicial Conduct to the Governor, the Legislature and the Chief Judge of the Court of Appeals* in its section dealing with "Commission investigations," this Commission was pursuing the procedure of overseeing the Court system in this State.

"1. Monitoring

MOnitoring can be a valuable tool for determining a judge's courtroom demeanor. Staff members have observed the court behavior of judges, both in an attempt to verify the claims of the complaint and to follow up on 'leads' obtained, for example, from newspaper articles. Even after a complaint is dismissed for lack of sufficient evidence of misconduct a judge's courtroom may be monitored by Commission staff observers. Monitoring may give rise to a subsequent inquiry which in turn may lead to proof of misconduct. In addition, monitoring is useful for more than uncovering or substantiating evidence. It is likely that judges will exhibit more temperate and judicious behavior as a direct result of knowing or simply believing that their behavior is being observed. Monitoring, therefore, is not only a valuable investigatory tool, but a valuable deterrent as well.

Staff observation has been somewhat limited to the New York City area, since the Commission's sole office is in Manhattan. Because there is a statewide need for monitoring, plans are now being formulated for a comprehensive monitoring program. The possibility of

coordinating the monitoring efforts of civic-oriented groups, such as the League of Women Voters, the Fund for Modern Courts and the Church Women United, is being explored. Such organizations have begun to set up committees which monitor local courts on a regular basis. Organized channels will be established through which local volunteer monitoring efforts will be reported to the Commission.

The Commission will play an important role in assisting groups interested in monitoring to establish meaningful guidelines. Citizens can be effective monitors if they are trained properly. The Commission staff will assist monitoring programs by helping to train monitors to understand court proceedings and recognize misconduct. Monitoring forms have already been reviewed by the Commission staff and appropriate suggestions made in connection with one federally funded program and one law school program. One Law school has expressed an interest in participating in the Commission's work by offering law students course credits for court monitoring of judicial conduct. The Commission already employs law students to do monitoring under the supervision of the staff.*

2. Other Sources of Information

District Attorney's offices have been informed of the Commission's existence and purpose, and efforts are being made to seek cooperation from these and other law enforcement agencies. Some have promised to cooperate with the Commission by turning over any evidence of possible misconduct by a judge that falls short of actual criminality. Such cooperative efforts have, to some extent, already proved to be fruitful.

There is a good deal of information which comes to the Commission in an informal manner. Since it is the

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*In some cases, our monitors have been asked by judges or court personnel to identify themselves. Compelling people to state their name and purpose may have a chilling effect on the viewing of court proceedings by the public. People should be encouraged to visit courts, and should not be embarrassed by having to explain the nature of their visit. Judges should be advised not to interfere with the public's right to be present in court.

Commission's policy to be responsive to reports of judicial misconduct and criticism of the judiciary, anonymous letters are considered and, in appropriate instances, may serve to launch inquiries. Other information is also considered. By the nature of its work, the Commission staff meets with attorneys, prosecutors, law enforcement personnel and many others who have knowledge of the courts. Observations from these sources are likely to be more accurate than the average letter of complaint received by the Commission.

Several hundred attorneys have been interviewed in the course of the Commission's investigations. Discussions with them inevitably have covered their perception of misconduct in the courts and judges not under inquiry. This kind of information may lead to monitoring or some other inquiry to ascertain the accuracy of the information and the degree of the possible misconduct.

Because litigants and lawyers are important sources of information, the Commission must be highly visible if it is to receive complaints and other allegations about judicial misconduct. The Commission has sought to reach attorneys by notifying bar associations within New York State of the Commission's existence and purpose. Articles about the Commission by the Administrator were published in three major law journals in the state, and the Commission has invited attorneys to submit complaints. All major newspapers have also been advised of the Commission's existence and have been asked to publicize the Commission's address so that citizens will know where to send their complaints.

3. Newspaper and Other Media Reports

The Commission recognizes the value of newspapers as a source of information. Media criticism of judges and reports of alleged judicial misconduct are investigated by the Commission. The Commission purchases every major newspaper in the state, and a law student or clerk reads all of them daily for any press reports of judicial conduct which might give rise to a

Commission inquiry. Newspaper reports have already led to the commencement of several significant investigations."

* * *

"We monitor judges on the bench and will work together with citizens' groups monitoring or interested in monitoring their local courts. We are confident that we can be aggressive and responsive to allegations of judicial misconduct while safeguarding the rights of judges.

Although identifying misconduct is an important purpose of the legislation establishing the Commission—*the Commission intends to do more than investigate complaints and bring charges.* Our work does more than point up the existence of individual misconduct. It is relevant to the purpose of the legislation to make observations that might prove helpful in achieving improvements in the Court system.

We have interpreted our legislative mandate in broad terms and believe we would be wasting our efforts to concentrate only on bringing charges against judges. We believe we might help deter some misconduct in the future by addressing larger issues." (Italics added for emphasis.)

(First Report of the Temporary State Commission on Judicial Conduct to the Governor, the Legislature and the Chief Judge of the Court of Appeals of the State of New York, October 1975, pp. 10-13, 35-36; see, also *Annual Report, New York State Commission on Judicial Conduct,* January 1978, p. 11, pp. 45-46).

It is also clear that when the current legislation was before the Governor not all were in favor of it being signed. As Assemblyman Charles D. Henderson, now Assistant Minority Leader of the Assembly, wrote to the Governor and indicated his prediction concerning the creation of a Commission to monitor the judiciary branch of New York State Government to be as follows:

"I predict that the unnecessary powers in this part of the bill will lead to abuse[s] that will destroy the

court system and come back to haunt those who contrived the scheme.

That portion of the bill dealing with the Commission on Judicial Conduct will result in political corruption the like of which this state has never seen before. No judge will be able to remain independent and unfettered in the discharge of his obligations. When we adopt a statute that provides virtually no due process guarantee for any member of the judiciary, as this bill does, we are granting greater protection to the murderer and rapist than to a judge.

It will be only a matter of time before the whole judicial system will be a shambles and tool of a fascist few. Just imagine a power hungry administrator who wanted to pack all the courts with his political cronies. We have, with this bill, created the perfect vehicle with which to remove from the courts all judges that do not knuckle to or acquiesce to the desires of the hierarchy. It is simple; all the control is in the hands of those with the power to appoint.

In addition, Governor, either you or those dealing for you did not with to give our present Commission on Judicial Conduct, which is only two years old, a chance to see if it could ease whatever ailments effect the judiciary. Why? Because it did not provide enough power to dictate and rule absolute by the zealots?''

There is no question but that a system should be developed to effectively discipline judges who misuse their judicial office. Judges should be independent not immune. It has been said a Judge's independence '' 'is not for the protection or benefit of a malicious or corrupt Judge, but for the benefit of the public, whose interest it is that the Judges should be at liberty to exercise their functions with independence and without fear of consequences.' '' *Bradley v. Fisher* (13 Wall 335 [1872]: see also, *Pierson v. Ray* (386 U.S. 547 [Douglas, J., dissenting]); cf. *Casey v. United States* (343 U.S. 808); *Ramspeck v. Federal Trial Examiners Conference* (345 U.S. 128). However, the system to discipline judges as currently provided for in New York

is one which fails to meet constitutional due process of law requirements, and for that reason should be struck down by this Court. Article 6, Section 22, of the New York State Constitution authorizes the current Commission on Judicial Conduct to "Receive, initiate, investigate and hear complaints with respect to the conduct, qualification, fitness to perform or performance of official duties of any judge or justice of the unified court system * * * and may determine that a judge or justice be admonished, censured, or removed from office for cause * * *." It is further provided that any determination of the Commission shall be transmitted to the Chief Judge of the Court of Appeals, who thereafter shall notify the Judge or Justice involved, giving him an opportunity to seek review of the Commission's determination by the Court of Appeals.

With regard to the Commission's prosecutorial authority, it has been said:

> "A prosecutor is the epitome of an officer of the executive branch. He is powerless to make judicial or quasi-judicial determinations, albeit his discretion is broad indeed as is true of many administrative officers. To bring his office within the judicial umbrella in order to sustain prohibition because he is often characterized as a 'quasi-judicial' officer is to render no service to the analysis, any more than to say that because a lawyer is an officer of the court he is vested with some kind of judicial office. The fact is that the characterization of 'quasi-judicial' officer is to demark his responsibilities from those of any lawyer. It expresses the mandate that his responsibility is not only to investigate and prosecute but to do so subject to the imperatives of his responsibilities toward the public, the courts, and the persons he brings to heel on charges of crime, and that he do so with the same degree of objectivity and neutrality that one expects of a court (see *People v Fielding,* 158 NY 542, 547; *Matter of McDonald v. Goldstein,* 273 App. Div. 649, 651). It does not make him a judicial officer." [Chief Judge Breitel, dissenting] *Matter of Dondi v. Jones,* (40 NY2d 8, 22-23).

Without question a prosecutor represents the epitome of the executive branch of government; however, it is submitted that a prosecutor's responsibility to law enforcement is as a matter of law inconsistant with the judicial function of adjudication. As this Court recently held in *Gerstein v. Pugh* (421 U.S. 103):

> "More recently, in *Coolidge v. New Hampshire,* 403 U.S. 443, 449-453, the Court held that a prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate. We reaffirmed the principle in *Shadwick v. City of Tampa,* 407 U.S. 345, and held that probable cause for the issuance of an arrest warrant must be determined by someone independent of police and prosecution. See also *United States v. United States District Court,* 407 U.S. 297, 317.'

The manner in which the current New York State Commission on Judicial Conduct operates is certainly inquisitorial—controlling its own investigations, making its own determinations as to whom to investigate, filing its own formal charges, and doing all of this as an autonomous body. Mr. Justice Frankfurter in *Watts v. Indiana,* (338 U.S. 49, 54), observed that:

> "Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end. Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused *even under judicial safeguards,* but by evidence independently secured through skillful investigation. * * *: (citations omitted and italics added for emphasis.)

In addition, the fact that this Commission is unquestionably composed of honorable and learned individuals does not in and of itself guarantee due pro-

cess of law.[7] It has often been said that ours is a government of laws and not of men and that it is not enough to know that the men applying the standard are honest and devoted, for when the government becomes the moving party and levels its forces against the citizen, it must be held to the same standard of fair dealing, lest adopt a government of lesser standards for convenience and start down the path of totalitarianism. *Joint Anti-Fascist Refugee Committee v. McGrath,* (341 U.S. 123, 177 [Douglas, J., concurring]).

It was further pointed out by Mr. Justice Frankfurter in his concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath* (supra):

> "Fairness of procedure is 'due process in the primary sense.' *Brinkerhoff-Faris Co. v. Hill,* 281 U.S. 673, 681. It is ingrained in our national traditions and is designed to maintain them. In a variety of situations the Court has enforced this requirement by checking attempts of executives, legislatures, and lower courts to disregard the deep-rooted demands of fair play enshrined in the Constitution. '[T]his court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution." Id. at p. 161.

It was further pointed out that to allow a Commission which could do all that was necessary to remove a Judge or Justice clearly violated due process citing *Matter of Murchison,* (349 U.S. 133) where this court held:

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7. Although not raised at Special Term, the petitioner-appellant objected on his direct appeal to that portion of the New York State Commission on Judicial Conduct which is made up of lay individuals on the ground that his Sixth Amendment right to counsel was being denied. It is submitted that that being a fundamental right, it could be raised for the first time on appeal citing *North v. Russell,* (427 U.S. 328).

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' *Tumey v. Ohio,* 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States,* 348 U.S. 11, 14."

It is clear that the New York State Constitutional provision and the Judiciary Law provisions of the State of New York giving rise to this Commission have created an entity which could be referred to as a fourth branch of government which is violative of due process. [Cf. *Marshall v. Jerrico, Inc.* — U.S. —, 100 S.Ct. 1610; *Carey v. Piphus,* 435 U.S. 247; *Mathews v. Eldridge,* 424 U.S. 319; *Taylor v. Hayes,* 418 U.S. 488; *Ward v. Village of Monroeville,* 409 U.S. 57; *Offutt v. United States,* 348 U.S. 11; *Tumey v. Ohio,* 273 U.S. 510]. It is an eleven member grand jury which files its own indictment [referred to as a complaint, Administrator's Complaint or Formal Written Charges], prosecutes its own complaint or formal written charges and renders its own determination. The right of cross examination is lost because the Commission members cannot be cross examined with regard to their part in an investigation. (See *Matter of Richardson* 247 NY 401 [Cardozo, Ch. J.]). While the motivation for the creation of this Commission was indeed one based in good will, its very creation cuts into the

heart of the foundations of our concepts of fairness. As this Court held in (*McNabb v. United States,* 318 U.S. 343)

> "A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relied for its vindication."

There can be no question but that there has always been a great concern with respect to the commingling of various functions because of the obvious opportunity it presents to undermine judicial fairness. *Wong Yang Sung v. McGrath,* (339 U.S. 33). Moreover, it has been said that at times of unrest which have been caused by fear of internal subversion, the basic law and due process values may to some seem to be extravagant, but nevertheless the right of personal security against arbitrary intrusion by official power is still of prime importance. *Coolidge v. New Hampshire,* (403 U.S. 443, 454).

It is the Petitioner-Appellant's contention that the New York State Commission on Judicial Conduct is not an administrative agency, but rather a newly created fourth branch of New York State government. Prior to the creation of the current New York State Commission on Judicial Conduct, the former Commission, in essence, did all of the same things that are currently being done, with the major exception that in the event charges were brought against a Judge or Justice, it would require that those charges be heard by the con-

vening of the Court on the Judiciary. Now, under the current legislation, this Commission has been authorized to do all the things that the former Court on the Judiciary did and that court has, for all practical purposes been done away with. The court at Special Term relied upon the cases of *Withrow v. Larkin,* (421 U.S. 35). *Hortonville Joint School District # 1 v. Hortonville Ed. Assoc.,* (426 U.S. 482) and *F.T.C. v. Cement Institutes,* (333 U.S. 683). It is submitted that none of these cited cases stand for the broad proposition that there may be a commingling of functions by a commission such as the New York State Commission on Judicial Conduct which may investigate, prosecute and then remove any judge or justice of a State. This court pointed out in *Withrow v. Larkin* (421 U.S. 35) that the question concerning to what extent commingling of functions could exist was a substantial one to which no single answer had yet been reached. This court further recently pointed out in *Marshall v. Jerrico* (—U.S.—, 100 S.Ct. 1610, 1613-1614) that the balance of investigation, prosecution and adjudication should be maintained in a nice, clear and true fashion as between the State and the accused. This balance is non existent as far as the judges and justices of this State are concerned. In order to insure an independent judiciary in the State of New York this Court should resolve this question presented by this case. (cf. *Chandler, United States District Judge v. Judicial Council of the Tenth Circuit of the United States,* (382 US 1003, 1005-1006). It is submitted that the powers of this Commission are so extensive as to violate the Fifth and Fourteenth Amendments to the United States Constitution. This court should review this important question.

SECOND IMPORTANT QUESTION PRESENTED

The Petitioner-Appellant at Special Term argued that Section 22, Article 6, of the New York State Con-

stitution and Subdivision 4, Section 44, of the New York State Judiciary Law violated his Federal due process rights in failing to set forth any standard as to what was required in order for the New York State Commission on Judicial Conduct to bring formal written charges against a judge or justice. Special Term held that the term 'for cause' as the basis for any Commission sanction under the New York State Judiciary Law was not void for vagueness citing *Friedman v. State of New York,* (24 NY2d 528), Appeal Dismissed (397 U.S. 317). The Petitioner-Appellant does not claim that that portion of the legislation which deals with a finding of 'for cause' in order to impose a sanction is violative of the Fourteenth Amendment. It is rather his claim, which the Court at Special Term and the Appellate Courts of the State of New York did not address themselves to, that there is no requirement in the statutory scheme controlling this Commission of any standard of proof or quantum of evidence required to be before the Commission before it may file formal written charges against a judge or justice.

Section 44 of the New York State Judiciary Law states that the Commission shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties by any judge. However, neither that section nor any other section of the New York State Judiciary Law sets forth a requirement that prior to conducting its investigation, or prior to the filing of formal written charges, there must be a certain amount of proof with regard to an allegation concerning judicial misconduct. For example, there is no requirement that there be reasonable grounds to believe that judicial misconduct is taking place, nor is there a requirement that there be probable cause, nor any of the other old bromides known to the law.

Subdivision 4, Section 44, of the New York State Judiciary Law merely provides that "If in the course of an investigation, the Commission determines that a

hearing is warranted, it shall direct that a formal written complaint* * * * *" be filed. The statute fails to set forth that there be a certain level of proof before the Commission prior to its directing that there be formal written charges filed against a judge. This is probably the only statute in the State of New York which allows someone to be brought up on charges which are analagous to criminal proceedings (*People v. LaCarrubba,* 46 NY2d 658) without there being at least legally sufficient evidence before the Commission to establish each and every one of the elements of an allegation of misconduct. Is the standard being followed by the Commission whim and caprice, self-righteous indignation, or is it acting upon, to paraphrase the language of this Court, town rumours or the gossip of the village idiot? (cf. *United States v. United States District court,* 407 U.S. 290; *Coolidge v. New Hampshire,* 403 U.S. 443) A close review of the rules now in effect on the New York State Commission on Judicial Conduct, 22 NYCRR 700.1 through 7001.11, fails to set forth any burdens of proof or quantum of evidence requirements to be before the Commission before it may direct the filing of formal written charges against a judge or justice.

It is submitted that because charges may be lodged without some degree of legally sufficient evidence being required prior to the initiation of a formal written charge against a judge or justice, they are being denied the process due them by reason of the due process clause of the Federal Constitution. No person should have to stand before a tribunal accused of misconduct when there is a possibility that there is a total lack of proof from a credible source that he did, in fact, do something improper.

THIRD IMPORTANT QUESTION PRESENTED

The Petitioner-Appellant at Special Term contended that his Federal due process rights were being violated in that the New York State Judiciary Law failed to set forth any standard of proof being required before an Administrator's Complaint could be filed against him as the law was in effect on May 25, 1977. (New York State Judiciary Law, Subd. 2, Sect. 43). It was noted in *Matter of Sussman v. New York State Organized Crime Task Force,* (39 NY2d 227, 235), by the New York Court of Appeals that "* * * [Their] attention had been invited to no case in which a statute conferring investigative authority has been held unconstitutional on the ground that the scope of such authority has not been sufficiently precisely defined, nor have we found any." It is not the Petitioner-Appellant's argument that the authority is not defined. It is, rather, his contention that there is no standard of proof required prior to the Commission conducting an investigation of a complaint. In other words, what is necessary before an investigation may be commenced with regard to a complaint against a judge? There is no requirement that there be reasonable grounds to believe that any misconduct had taken place, nor probable cause to believe that misconduct had taken place. It is respectfully submitted that in order to insure an independent judiciary there should be at least some degree of legally required evidence to be submitted to the Commission before it can conduct any investigation. The standard should not be headhunting, witchhunting or search and destroy.

With regard to this contention, Special Term again put the cart before the horse and held that as long as the sanction to be imposed was defined as requiring cause, this statute was not vague. The Petitioner-Appellant does not question the requirements in order

for a sanction to be imposed. He does, however, question the authority of the Commission to initiate an investigation against a judge when there is no standard set forth as to what is required to come to the Commission's attention in order to subject a member of the judiciary to an investigation concerning his qualifications, conduct, fitness to perform or the performance of his official duties.

In *A'Hearn v. Committee on Unlawful Practice of the Law of New York County,* (23 NY2d 916 [per curiam opinion]), by way of caution, the Court stated: "It is ancient law that no agency of the government may conduct an unlimited and general inquisition into the affairs of persons within its jurisdiction solely on the prospect of possible violations of law being discovered * * * *" Id. at 918. See, also, *In the Matter of the Temporary Commission of Investigation of the State of New York v. French,* (68 AD2d 681). It was further pointed out in that case that "There had been but a bare showing for the basis of inquiry but it was enough to initiate it." *A'Hearn,* (supra). In the statute now being examined by this Court there is not even a requirement for there to be a 'bare showing' for the basis of the inquiry. It is respectfully submitted that it is not enough. The statute must have some form of requirement before a complaint with regard to a member of the judiciary may be taken and investigated. After all, it is the complaint that serves as the basis for the investigation. The question is, what quantum of proof is required for there to be a basis for an Administrator's Complaint to be filed to permit a judge or justice of a State to be investigated at the whim of a Commission is to do away with the concept of an independent judiciary which independence is necessary in order to insure the public's safety. *Pierson v. Ray* (386 U.S. 547 [Douglas, J. dissenting]).

FOURTH IMPORTANT QUESTION PRESENTED

The contention that the providing of a Referee to hear and report violated a Respondent's rights before any such Referee was raised at Special Term. The Court at Special Term found this argument to be without merit. *Matter of Waltemade,* (37 NY2d nn) The Court, in *Matter of Waltemade* (supra) held that such a procedure was within the power of the then existing Court on the Judiciary. While the Petitioner-Appellant in a short sentence claimed to rest his ground of objection on the dissent in *Waltemade,* (supra), that was by inadvertence the wrong case upon which he meant to make his claim. The Petitioner-Appellant meant to rely on the dissent in *Mildner v. Gullotta,* (405 F. Supp. 182, 212, 213), and the cases cited thereat of *Berger v. California,* (393 U.S. 314), and *Barber v. Page,* (390 U.S. 719).

The Commission under the current statutory scheme may accept or reject any of the finding of fact or conclusions of law of the Referee. It seemingly has unbounded power to do such. It is submitted that the Commission by having that authority is denying the Petitioner-Appellant due process because the Referee is the one who observes the demeanor and composure of given witnesses, and yet he may be disregarded completely.

FIFTH IMPORTANT QUESTION PRESENTED

The Court at Special Term, after granting a Writ in the Nature of Prohibition in part, sua sponte, held:

> "It should be noted of course that should the commission find on the basis of information in its files, that additional complaints are warranted, it may of course file such a complaint in accordance with the procedures provided in Judiciary Law Section 44(2)."

It is submitted that to permit the New York State Commission on Judicial Conduct now, after having illegally investigated the Petitioner-Appellant as a Town Justice, as opposed to investigating its Administrator's Complaint, to file additional Administrator's Complaints or formal written charges as against the Petitioner-Appellant upon the basis of the fruits it illegally discovered, would be against the concept of fundamental fairness and due process. We are all familiar with the Silver Platter Doctrine wherein one jurisdiction was allowed to use evidence which was obtained illegally in another jurisdiction. *Burdeau v. McDonwell,* (256 U.S. 465); *Lustig v. United States,* (338 U.S. 74); *Elkins v. United States,* (364 U.S. 206). In order to prevent this Commission from conducting illegal investigations of judges or justices in the future, it is submitted that this Court should formulate an exclusionary rule which would prohibit the Commission from using the fruits of an illegal investigation as the basis for filing new complaints or formal written charges as against a judge or justice. While it is clear that a formal written charge need not be confined to the matters alleged in an Administrator's Complaint, just as an Indictment need not be confined to what an original arrest was for, it is submitted that when an investigation becomes so broad as to go into unauthorized areas, such as in the instant case, any of the fruits derived from that illegal investigation, should not be able to be used at a later point in time. To permit the fruits of an illegal investigation to be used would, in essence, be putting a premium upon such type of investigatory tactics.

CONCLUSION

THIS MATTER SHOULD BE SET DOWN FOR BRIEFING AND ORAL ARGUMENT.

Respectfully submitted,

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APPENDIX 1—DECISION SLIP OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT.

Murphy, P.J., Birns, Fein, Ross, Markewich, JJ.

7625 Matter of Angelo Darrigo,
Petitioner-Appellant-Respondent,H. Karger

For a Judgment, etc.,

-against-

State Commission on Judicial Conduct,
et al.,
Respondents-Respondents-Appellants.

R.S. Hack

Judgment, Supreme Court, New York County (Dontzin, J.), entered on July 3, 1979, dismissing this Article 78 application unanimously affirmed, without costs and without disbursements. See *Matter of Nicholson v. State Commission on Judicial Conduct,* 68 AD 2d 851, the holding in which is underscored by the fact pattern found in *Matter of Nicholson and Lambert v. State Commission on Judicial Conduct,* AD 2d , 422 N.Y.S. 2d 701.

Order filed.

APPENDIX 2—ORDER OF SUPREME COURT, STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT SOUGHT TO BE REVIEWED ON THIS APPEAL.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 20, 1980

Present—Hon. Francis T. Murphy, Jr., Presiding Justice
Harold Birns,
Arnold L. Fein,
David Ross,
Arthur Markewich, Justices.

Matter of ANGELO DARRIGO,
Petitioner-Appellant-Respondent,

For a Judgment under Article 78 of the CPLR in the Nature of Prohibition,

-against-

STATE COMMISSION ON JUDICIAL CONDUCT, the HON. MRS. GENE ROBB, CHAIRPERSON, the HON. GERALD STERN, ADMINISTRATOR, and the HON. FRANCIS L. VALENTE, JR., REFEREE, and THE SEVERAL OTHER MEMBERS OF THE NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT AS IT CURRENTLY EXISTS PURSUANT TO THE CONSTITUTION OF THE STATE OF NEW YORK, ART. 6, SECT. 22, AND THE JUDICIARY LAW OF THE STATE OF NEW YORK, SECTS. 40-48,

Respondents-Respondents-Appellants.

7625

Cross-appeals having been taken to this Court by the petitioner-appellant-respondent and respondents-respondents-appellants from the judgment of the Supreme Court, New York County (Dontzin, J.) entered on July 3, 1979, which, *inter alia,* dismissed petitioner's Article 78 CPLR application,

And said appeals having been argued by Mr. Howard Karger of counsel for petitioner-appellant-respondent and by Mr. Raymond S. Hack of counsel for respondents-respondents-appellants; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the judgment so appealed from be and the same hereby is affirmed, without costs and without disbursements.

ENTER:

JOSEPH J. LUCCHI

Clerk.

APPENDIX "3"
OPINION OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

(SAME TITLE)

DONTZIN, J.:

Motions 70, 71, 92 and 104 of the calendar of March 2, 1979 are consolidated for disposition.

Petitioner has brought an Article 78 proceeding, seeking an order in the nature of a writ of prohibition, declaring that the New York State Constitution, Article 6, Sec. 22, and the Judiciary Law, Sec. 40-48, (effective April 1, 1978) which authorize and create the State Commission on Judicial Conduct, ["Commission"] substantively and as applied violated his federal constitutional rights under the First, Fifth, Sixth and Fourteenth amendments. Additionally, the petitioner seeks a writ of prohibition challenging the Commission's "subject matter jurisdiction" to investigate cases other than the one which was the basis for the initial Administrator's complaint. Respondent has cross-moved for an order pursuant to CPLR Sec. 7803(f) and 3211(a) dismissing the petition for failure to state a cause of action. The Attorney General has filed a brief in opposition to the petition, as Attorney Pro se pursuant to Executive Law Sec. 71 and CPLR Sec. 1012(b).

Petitioner is, and has been for 22 years, the Town Justice presiding in the Town of Newburgh Justice Court, Orange County, New York, and is an attorney. Respondent Commission, during the course of an investigation of another Town Justice, discovered in that Justice's files a letter signed by petitioner requesting special consideration on behalf of a Joseph Catania ["Catania"] who had received a traffic ticket. An "Administrator's complaint" relating to the traffic ticket issued to Catania was filed with the Commission pursuant to Sec. 44(2) of the Judiciary Law, on April 22, 1977. Thereafter, Commission investigators inspected public records at the Newburgh Town Court. Subsequently, petitioner was requested by letter to explain the disposition of a total of thirty-nine criminal cases all

relating to "traffic summonses." He responded to these letters. Petitioner was requested to appear before the Commission on June 26, 1978 relative to the 39 traffic cases including the Catania matter. Petitioner failed to appear on that date and two subsequent hearings scheduled for July 18th and July 27th, 1978.

A formal written complaint was filed with the Commission on September 20, 1978 alleging failure to appear before the Commission. An answer has been filed to that complaint, and a referee appointed to hear and report conducted proceedings on December 20, 1978 and February 9, 1979. There apparently has been no report as yet by the Referee.

I. APPROPRIATENESS OF AN ARTICLE 78 PROCEEDING

Ordinarily one who objects to the act of an administrative agency must exhaust the available administrative remedies before being permitted to litigate in a court of law. (*See* Young Men's Christian Assn. v. Rochester Pure Waters Dist., 37 NY2d 371). "The exhaustion rule, however, is not an inflexible one. It is subject to important qualifications. It need not be followed, when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power." (Watergate II Apartments v. Buffalo Sewer Authority, 46 NY2d 52, 57; Matter of First National City Bank v. City of New York, 36 NY2d 87, 92-3). However, a writ of prohibition will not lie if an adequate remedy at law is available. (*See* Proskin v. County Court of Albany County, 30 NY2d 15, 18; Matter of State of New York v. King, 36 NY2d 59, 62-3; Jerry v. Board of Education, 75 Misc 2d 461, mod. on other grounds, 44 AD2d 198, mod. on other ground, 35 NY2d 534).

In Cunningham v. Stern, (93 Misc 2d 516) a case not dissimilar to the instant case, three Town Justices brought an Article 78 proceeding in an effort to prohibit the former Commission on the Judiciary from investigating and prosecuting them for alleged misconduct. The Petitioners there alleged that the Commission was acting in "excess of their authority" and engaged in "unconstitutional and unlawful investigative practices." The court at page 519 held:

> "[P]rohibition is a preventive rather than a remedial procedure and hence is not available for the purpose of reviewing or restraining interlocutory or preliminary determinations for which appropriate trial or appellate relief is available."
>
> and . . .
>
> "[O]nly where the authority sought to be restrained assumes or threatens to act totally without jurisdiction, or in a manner clearly in excess of its authorized powers, may prohibition be granted."

This court is inclined to agree with the rationale of *Cunningham,* to the extent that it deems an Article 78 proceeding in the nature of a writ of prohibition inappropriate, with respect to the constitutional issues raised. (*See* Matter of Nigrone v. Murtagh, 36 NY2d 421)

If necessary, Petitioner will have a sufficient opportunity to raise the constitutional issues presented here in the Court of Appeals. A review by that Court of any action taken by the Commission is afforded to Petitioner as a matter of right (Article 6, Sec. 22(a) New York State Constitution). However, this is not dispositive of this issue, since the aspect of this proceeding should be treated as an action for a declaratory judgment (Kovarsky v. Housing Development Administration 31 NY2d 184, 192; Lakeland Water District v. Onendago Co. Water Auth. 24 NY2d 400; Watergate II Apartments v. Buffalo Sewer Authority, *supra;* CPLR Sec. 103(c)].

With respect to that aspect of this proceeding challenging the Commission's action because it is acting in excess of its subject matter jurisdiction, a proceeding in the nature of prohibition is appropriate. (Watergate II Apartments v. Buffalo Sewer Authority, *supra*)

II. CONSTITUTIONALITY OF N.Y. STATE CONSTITUTION ARTICLE 4, Sec. 22 and JUDICIARY LAW Sec. 40-48.

Petitioner challenges the granting of the combination of powers to the Commission to investigate, prosecute and adjudicate the matters coming before it as being violative of

due process under the Fourteenth Amendment, as well as other constitutional rights. While the U.S. Supreme Court has articulated the necessity of safeguarding the processes of criminal justice by vesting different functions in different participants, (*See* McNabb v. United States, 318 U.S. 332; Gerstein v. Pugh, 420 U.S. 103), absent a clear showing of actual bias, a combination of investigative, prosecutorial and judicial functions in a single administrative agency does not violate due process. (*See* Withrow v. Larking, 421 U.S. 35, 47; Hortonville District v. Hortonville Ed. Ass'n., 426 U.S. 482; FTC v. Cement Institute 333 U.S. 683).

With regard to judicial disciplinary proceedings, it has been held that it was not violative of due process for the former Court on the Judiciary to review and approve charges, to appoint counsel to prosecute, and to sit in judgment on a case. (Friedman v. State of New York, 24 N.Y.2d 528, app. dism., 397 U.S. 317). As to the argument that there is a lack of standard or guidelines to define when the Commission should initiate a complaint or file formal written charges against a judge, it has already been held that the phrase "for cause" as the basis for any Commission sanction under Judiciary Law Sec. 44(1) is not void for vagueness. (*See, Friedman v. State,* supra; Sarisohn v. Appellate Division, 265 F. Suppl 455, 458). So long as the investigation follows the filing of a complaint " . . . with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice . . . " (N.Y. State Const., Art. 6, Sec. 22(a); see, also, Jud. Law Sec. 44(2), due process has not been violated. Petitioner also claims that Sec. 43(2) of the Judicial Law providing for a hearing before a Referee is unconstitutional. This argument was rejected in Matter of Waltemade, 37 NY2d nn).

III. SUBJECT MATTER JURISDICTION

Petitioner's final argument challenges the Commission's "subject matter" jurisdiction to investigate cases other than the one which was the basis for the initial administrator's complaint.

The Commission's investigations are initiated on the complaint of a complainant or on its own initiative

(Judiciary Law Sec. 44, Subd. [1] & [2] Section 2 provides:

> "The commission may, on its own motion, initiate an investigation of a judge with respect to his qualifications, conduct, fitness to perform or the performance of his official duties. *Prior to initiating any such investigation, the commission shall file as part of its record a written complaint, signed by the administrator of the commission, which complaint shall serve as the basis for such investigation.*" (emphasis supplied)

It is the contention of the Commission that the Administrator's complaint, concerning petitioner's letter seeking consideration for Catania, served as a basis for initiating an investigation which covered all thirty-nine matters the Commission sought to examine the petitioner on at the initial and subsequent scheduled hearings. A similar contention was recently rejected by the Appellate Division, 1st Department, which held:

> "[W]e are convinced that when the Legislature included the term "complaint" in the statute (Judiciary Law, Sec. 44[1][2], it intended to utilize a complaint as a legal device to *circumscribe* the areas of any authorized investigation." (emphasis supplied) (Matter of Nicholson, —AD2d—, —NYS2d— NYLJ Jan. 25, 1979, p. 6, col. 6).

Although the *Nicholson* case involved the question of the subpoena powers of the Commission, the underlying rationale compels the conclusion that the Administrator's complaint here limited the scope of the investigation and that anything beyond it exceeded the powers of the Commission. To hold otherwise would be contrary to our system of law which has always endeavored to prevent even the probability of unfairness.

Accordingly, with respect to this branch of the motion a writ will issue to prohibit the respondent from investigating matters other than the specific allegations contained in the complaints presently before it. It should be noted of course that should the Commission find, on the basis of information in its files, that additional complaints are warranted, it

may of course file such a complaint in accordance with the procedures provided in Judiciary Law Sec. 44(2).

The petition as it relates to the challenge to the constitutionality of Article 6, Sec. 22(a) and Judiciary Law, Sec. 40 to 48, is dismissed. With respect to the question of "subject matter jurisdiction" a writ will issue prohibiting the Commission from investigating matters to which no complaint has been filed according to Sec. 44(2) of the Judiciary Law. The cross motion is decided in accordance with the foregoing.

Settle judgment.

Dated: May 24th, 1979

s/Michael J. Dontzin
J.S.C.

APPENDIX "4"
JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

(SAME TITLE)

At a Special Term, Part I, of the Supreme Court of the State of New York, held in the County of New York, at the County Court House thereof, on the 14th day of June, 1979.

PRESENT:
HON. MICHAEL J. DONTZIN,
Justice

Petitioner, ANGELO DARRIGO, having commenced a special proceeding pursuant to Article 78 of the Civil Practice Law and Rules, seeking a Writ in the Nature of Prohibition against the respondent above named, prohibiting respondents from taking any further action against respondent and declaring Sections 40-48 of the Judiciary Law unconstitutional, and the respondent GERALD STERN thereafter having moved for an order, pursuant to CPLR 7804(f) and 3211(a), dismissing the said special proceeding, and the petitioner thereafter having cross-moved for an order amending his petition in certain respects, and the petitioner having moved pursuant to CPLR 2201, for a stay of proceedings pending against petitioner before the respondent State Commission on Judicial Conduct, and the Attorney General having appeared and filed a brief in opposition to the petition pursuant to Executive Law Sec. 71 and CPLR Section 1012(b), and said petition and motions having come on to be heard before the Hon. Michael J. Dontzin, J.S.C., at Special Term, Part I, of the Court;

NOW, upon reading and filing the order to show cause signed by Hon. Hortense W. Gabel, dated February 7, 1979, the petition of ANGELO DARRIGO verified on February 6, 1979, filed in support of said special proceeding, and upon the reading and filing of the Notice of

Motion of the respondent GERALD STERN, dated February 15, 1979, for an order dismissing the petitioner's special proceeding, and the affirmation of GERALD STERN, dated February 15, 1979, in support of said motion, and upon reading and filing the Cross-Notice of Motion of the petitioner, dated February 21, 1979, for leave to amend the petition and the affidavit of the petitioner sworn to February 20, 1979, and the affirmation of HOWARD KARGER, dated February 20, 1979, in support of said Cross-Notice of Motion and in opposition to the motion of respondent STERN to dismiss, and upon the reading and filing of the petitioner's Notice of Motion dated February 23, 1979, for an order staying the respondents from proceeding further in the matter entitled

"In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to

ANGELO DARRIGO,

a Justice of the Newburgh Town Court, Orange County.

and the affidavit of HOWARD KARGER sworn to February 23, 1979, in support of said motion, and upon the reading and filing of the affirmation in opposition to said motion of GERALD STERN signed February 28, 1979, and the reply affidavit of HOWARD KARGER sworn to March 5, 1979, and upon reading the Attorney General's brief in opposition to the petition and the matter having regularly come on to be heard before the HON. MICHAEL J. DONTZIN, one of the Justices of the within Court, at Special Term, Part I, and Finkelstein, Mauriello, Kaplan & Levine, P.C. having appeared on behalf of petitioner and GERALD STERN having appeared on behalf of respondents, and due deliberation having been had thereon, and this Court having rendered a written decision dated May 24, 1979, it is

ORDERED that all of the above proceedings are consolidated for disposition, and it is further

ORDERED that the motion of petitioner for a stay of proceedings pending against the petitioner before the respondent, STATE COMMISSION ON JUDICIAL CON-

DUCT, pending the determination of this special proceeding is denied, and it is further

ORDERED AND ADJUDGED that the petition, insofar as it seeks to declare that Article 6, Section 22, of the Constitution of the State of New York and Sections 40-48 of the Judiciary Law violate petitioner's federal constitutional rights, is dismissed, and it is further

ORDERED AND ADJUDGED that the petition, insofar as it seeks to prohibit the respondents from investigating matters pertaining to petitioner for which no complaint has been filed pursuant to Section 44, subdivision 2, of the Judiciary Law is granted, and it is further

ORDERED AND ADJUDGED that the respondent STATE COMMISSION ON JUDICIAL CONDUCT is hereby restrained and prohibited from investigating matters pertaining to petitioner for which no complaint has been filed pursuant to Section 44, subdivision 2, of the Judiciary Law, unless and until the Commission shall receive or file additional complaints pertaining to petitioner pursuant to Section 44, subdivisions 1 and 2 of the Judiciary Law.

ENTER:
s/M.J.D.
J.S.C.

APPENDIX "5"
ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT DENYING PERMISSION TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 29, 1980.

Present:

Hon. Francis T. Murphy, Jr., Presiding Justice
Hon. Harold Birns
Hon. Arnold L. Fein
Hon. David Ross
Hon. Arthur Markewich, Justices

(SAME TITLE)

The above-named petitioner-appellant-respondent having moved for leave to appeal to the Court of Appeals from the order of this Court entered on March 20, 1980,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of said motion, and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied.

ENTER:
s/Joseph J. Lucchi
Clerk

APPENDIX "6"
ORDER OF THE NEW YORK STATE COURT OF APPEALS DENYING PERMISSION TO APPEAL AND DISMISSING THE APPEAL FILED AS OF RIGHT

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the third day of July, A.D. 1980

PRESENT: Hon. Lawrence H. Cooke,
Chief Judge, presiding.

(SAME TITLE)

A motion for leave to appeal to the Court of Appeals having heretofore been made herein upon the part of the appellant, and a cross-motion to dismiss the appeal taken as of right by said appellant having heretofore been made herein upon the part of the respondents, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied; and it is

ORDERED, that the said motion to dismiss appeal taken as of right be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

s/Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

APPENDIX "7"
NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

(SAME TITLE)

PLEASE TAKE NOTICE that the above-named Petitioner-Appellant, ANGELO DARRIGO, pursuant to 28 USC 1257, subdivision 2, hereby appeals to the Supreme Court of the United States from an order of the Appellate Division, First Department, entered March 20, 1980, which order unanimously affirmed an order and judgment (one paper) of the Supreme Court of New York County, entered in the Office of the Clerk of New York County on July 3, 1979, and which order finally determines this action where there is directly involved construction of the provisions of the New York State Constitution, Article 6, Section 22, and the Judiciary Law, Section 40-48, on the grounds that they are repugnant to the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. And said petitioner appeals with regard to the lack of any necessary standards in order for a Judge or Justice of a State to be charged with alleged wrongdoing in that such lack of standards is repugnant to the Fifth and Fourteenth Amendments to the United States Constitution.

DATED: Newburgh, New York
July 8, 1980

Yours, etc.
FINKELSTEIN, MAURIELLO, KAPLAN
AND LEVINE
Attorneys for Petitioner
436 Robinson Avenue
Newburgh, New York 12550
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TO: STATE COMMISSION ON JUDICIAL CONDUCT
Respondent
801 Second Avenue
New York, NY 10017

HON. MRS. GENE ROBB, CHAIRPERSON
Respondent
State Commission on Judicial Conduct
801 Second Avenue
New York, NY 10017

HON. GERALD STERN, ADMINISTRATOR
Respondent
801 Second Avenue
New York, NY 10017

HON. FRANCIS L. VALENTE, JR., REFEREE
Respondent
535 Fifth Avenue
New York, NY 10017

ATTORNEY GENERAL, STATE OF NEW YORK
2 World Trade Center
New York, N.Y. 10047
Attn.: Daniel M. Cohen,
Asst. Solicitor General

CLERK OF THE COURT (TWO COPIES)
Appellate Division, First Dept.
27 Madison Avenue
New York, NY 10010

APPENDIX "8"
NEW YORK STATE CONSTITUTION
ARTICLE 6, SECTION 22

§22 [Commission on judicial conduct; membership; organization and procedure; review by court of appeals; discipline of judges]

a. There shall be a commission on judicial conduct. The commission on judicial conduct shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system, in the manner provided by law; and, in accordance with subdivision d of this section, may determine that a judge or justice be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office, persistent failure to perform his duties, habitual intemperance, and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge or justice be retired for rental or physical disability preventing the proper performance of his judicial duties. The commission shall transmit any such determination to the chief judge of the court of appeals who shall cause written notice of such determination to be given to the judge or justice involved. Such judge or justice may either accept the commission's determination or make written request to the chief judge, within thirty days after receipt of such notice, for a review of such determination by the court of appeals.

b. (1) The commission on judicial conduct shall consist of eleven members, of whom four shall be appointed by the governor, one by the temporary president of the senate, one by the minotiry leader of the senate, one by the speaker of the assembly, one by the minority leader of the assembly and three by the chief judge of the court of appeals. Of the members appointed by the governor one person shall be a member of the bar of the state but not a judge or justice, two shall not be members of the bar, justices or judges or retired justices or judges of the unified court system, and

one shall be a judge or justice of the unified court system. Of the members appointed by the chief judge one person shall be a justice of the appellate division of the supreme court and two shall be judges or justices of a court or courts other than the court of appeals or appellate divisions. None of the persons to be appointed by the legislative leaders shall be justices or judges or retired justices or judges.

(2) The persons first appointed by the governor shall have respectively one, two, three, and four-year terms as he shall designate. The persons first appointed by the chief judge of the court of appeals shall have respectively two, three, and four-year terms as he shall designate. The person first appointed by the temporary president of the senate shall have a one-year term. The person first appointed by the minority leader of the senate shall have a two-year-term. The person first appointed by the speaker of the assembly shall have a four-year term. The person first appointed by the minority leader of the assembly shall have a three-year term. Each member of the commission shall be appointed thereafter for a term of four years. Commission membership of a judge or justice appointed by the governor or the chief judge shall terminate if such member ceases to hold the judicial position which qualified him for such appointment. Membership shall also terminate if a member attains a position which would have rendered him ineligible for appointment at the time of his appointment. A vacancy shall be filed by the appointing officer for the remainder of the term.

c. The term organization and procedure of the commission on judicial conduct shall be as provided by law. The commission on judicial conduct may establish its own rules and procedures not inconsistent with law. Unless the legislature shall provide otherwise, the commission shall be empowered to designate one of its members or any other person as a referee to hear and report concerning any matter before the commission.

d. In reviewing a determination of the commission on judicial conduct, the court of appeals may admonish, censure, remove or retire, for the reasons set forth in subdivi-

sion a of this section, any judge of the unified court system. In reviewing a determination of the commission on judicial conduct, the court of appeals shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based. The court of appeals may impose a less or more severe sanction prescribed by this section than the one determined by the commission, or impose no sanction.

e. The court of appeals may suspend a judge or justice from exercising the powers of his office while there is pending a determination by the commission on judicial conduct for his removal or retirement, or while he is charged in this state with a felony by an indictment or an information filed pursuant to section six of article one. The suspension shall continue upon conviction and, if the conviction becomes final, he shall be removed from office. The suspension shall be terminated upon reversal of the conviction and dismissal of the accusatory instrument. Nothing in this subdivision shall prevent the commission on judicial conduct from determining that a judge or justice be admonished, censured, removed, or retired pursuant to subdivision a of this section.

f. Upon the recommendation of the commission on judicial conduct or on its own motion, the court of appeals may suspend a judge or justice from office when he is charged with a crime punishable as a felony under the laws of this state, or any other crime which involves moral turpitude. The suspension shall continue upon conviction and, if the conviction becomes final, he shall be removed from office. The suspension shall be terminated upon reversal of the conviction and dismissal of the accusatory instrument. Nothing in this subdivision shall prevent the commission on judicial conduct from determining that a judge or justice be admonished, censured, removed, or retired pursuant to subdivision a of this section.

g. A judge or justice who is suspended from office by the court of appeal shall receive his judicial salary during such period of suspension, unless the court directs otherwise. If the court has so directed and such suspension is

thereafter terminated, the court may direct that he shall be paid his salary for such period of suspension.

h. A judge or justice retired by the court of appeals shall be considered to have retired voluntarily. A judge or justice removed by the court of appeals shall be ineligible to hold other judicial office.

i. Notwithstanding any other provision of this section, the legislature may provide by law for review of determinations of the commission on judicial conduct with respect to justices of town and village courts by an appellate division of the supreme court. In such event, all references in this section to the court of appeals and the chief judge thereof shall be deemed references to an appellate division and the presiding justice thereof, respectively.

j. If a court on the judiciary shall have been convened before the effective date of this section and the proceeding shall not be concluded by that date, the court on the judiciary shall have continuing jurisdiction beyond the effective date of this section to conclude the proceeding. All matters pending before the former commission on judicial conduct on the effective date of this section shall be disposed of in such manner as shall be provided by law.

Adopted Nov. 8, 1977.

APPENDIX "9"
NEW YORK STATE JUDICIARY LAW
SECTIONS 40-48

§40. DEFINITIONS

For the purposes of this article the following terms have the following meanings:

1. "Commission" means the state commission on judicial conduct.

2. "Judge" means a judge or justice of any court of the unified court system.

3. "Hearing" means a proceeding under subdivision four of section forty-four of this article.

4. "Member of the bar" means a person admitted to the practice of law in this state for at least five years.

§ 41. State Commission on judicial conduct; organization

1. A state commission on judicial conduct is hereby established. The commission shall consist of eleven members, of whom four shall be appointed by the governor, one by the temporary president of the senate, one by the minority leader of the senate, one by the speaker of the assembly, one by the minority leader of the assembly and three by the chief judge of the court of appeals. Of the members appointed by the governor one person shall be a member of the bar of the state but not a judge, two shall not be members of the bar, judges or retired judges, and one shall be a judge. Of the members appointed by the chief judge one person shall be a justice of the appellate division of the supreme court and two shall be judges of a court or courts other than the court of appeals or appellate divisions. None of the persons to be appointed by the legislative leaders shall be judges or retired judges.

2. Membership on the commission by a judge shall not constitute the holding of a public office and no judge shall be required to take and file an oath of office before serving on the commission. The members of the commission shall elect one of their number to serve as chairman during his

term of office or for a period of two years, whichever is shorter.

3. The persons first appointed by the governor shall have respectively one, two, three, and four year terms as he shall designate. The persons first appointed by the chief judge of the court of appeals shall have respectively two, three and four year terms as he shall designate. The person first appointed by the temporary president of the senate shall have a one year term. The person first appointed by the minority leader of the senate shall have a two year term. The person first appointed by the speaker of the assembly shall have a four year term. The person first appointed by the minority leader of the assembly shall have a three year term. Each member of the commission shall be appointed thereafter for a term of four years. Commission membership of a judge or justice appointed by the governor or the chief judge shall terminate if such member ceases to hold the judicial position which qualified him for such appointment. Membership shall also terminate if a member attains a position which would have rendered him ineligible for appointment at the time of his appointment. A vacancy shall be filled by the appointing officer for the remainder of the term.

4. If a member of the commission who is a judge is the subject of a complaint or investigation with respect to his qualifications, conduct, fitness to perform or performance of his official duties, he shall be disqualified from participating in any and all proceedings with respect thereto.

5. Each member of the commission, other than a judge, shall receive the sum of one hundred fifty dollars for each day's attendance at meetings of the commission or while otherwise engaged in commission business, not exceeding in any one year the sum of twelve thousand five hundred dollars. Each member of the commission shall be entitled to receive his actual and necessary expenses incurred in the discharge of his duties.

6. For any action taken pursuant to subdivisions four through eight of section forty-four or subdivision two of section forty-three of this article, eight members of the commission shall constitute a quorum of the commission

and the concurrence of six members of the commission shall be necessary. Two members of a three member panel of the commission shall constitute a quorum of the panel and the concurrence of two members of the panel shall be necessary for any action taken.

7. The commission shall appoint and at pleasure may remove an administrator who shall be a member of the bar who is not a judge or retired judge. The administrator of the commission may appoint such deputies, assistants, counsel, investigators and other officers and employees as he may deem necessary, prescribe their powers and duties, fix their compensation and provide for reimbursement of their expenses within the amounts appropriated therefor.

Added L. 1978, c. 156, § 1.

§ 42. Functions; powers and duties

The commission shall have the following functions, powers and duties:

1. To conduct hearings and investigations, administer oaths or affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation and require the production of any books, records, documents or other evidence that it may deem relevant or material to an investigation; and the commission may designate any of its members or any member of its staff to exercise any such powers, provided, however, that except as is otherwise provided in section forty-three of this article, only a member of the commission or the administrator shall exercise the power to subpoena witnesses or require the production of books, records, documents or other evidence.

2. To confer immunity when the commission deems it necessary and proper in accordance with section 50.20 of the criminal procedure law; provided, however, that at least forty-eight hours prior written notice of the commission's intention to confer such immunity is given the attorney general and the appropriate district attorney.

3. To request and receive from any court, department, division, board, bureau, commission, or other agency of the state or political subdivision thereof or any public authority

such assistance, information and data as will enable it properly to carry out its functions, powers and duties.

4. To report annually, on or before the first day of March in each year and at such other times as the commission shall deem necessary, to the governor, the legislature and the chief judge of the court of appeals, with respect to proceedings which have been finally determined by the commission. Such reports may include legislative and administrative recommendations. The contents of the annual report and anyother report shall conform to the provisions of this article relating to confidentiality.

5. To adopt, promulgate, amend and rescind rules and procedures, not otherwise inconsistent with law, necessary to carry out the provisions and purposes of this article. All such rules and procedures shall be filed in the offices of the chief administrator of the courts and the secretary of state.

6. To do all other things necessary and convenient to carry out its functions, powers and duties expressly set forth in this article.

Added L. 1978, c. 156, § 1.

§ 43. Panels; referees

1. The commission may delegate any of its functions, powers and duties to a panel of three of its members, one of whom shall be a member of the bar, except that no panel shall confer immunity in accordance with section 50.20 of the criminal procedure law. No panel shall be authorized to take any action pursuant to subdivisions four through eight of section forty-four of this article or subdivision two of this section.

2. The commission may designate a member of the bar who is not a judge or a member of the commission or its staff as a referee to hear and report to the commission in accordance with the provisions of section forty-four of this article. Such referee shall be empowered to conduct hearings, administer oaths or affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation and require the production of any books, records, documents or other evidence that the referee may deem

relevant or material to the subject of the hearing.

Added L. 1978, c. 156, § 1.

§ 44. Complaint; investigation; hearing and disposition

1. The commission shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform, or performance of official duties of any judge, and, in accordance with the provisions of subdivision d of section twenty-two of article six of the constitution, may determine that a judge be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office, persistent failure to perform his duties, habitual intemperance and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge be retired for mental or physical disability preventing the proper performance of his judicial duties. A complaint shall be in writing and signed by the complainant and, if directed by the commission, shall be verified. Upon receipt of a complaint (a) the commission shall conduct an investigation of the complaint; or (b) the commission may dismiss the complaint if it determines that the complaint on its face lacks merit. If the complaint is dismissed, the commission shall so notify the complainant. If the commission shall have notified the judge of the complaint, the commission shall also notify the judge of such dismissal.

2. The commission may, on its own motion, initiate an investigation of a judge with respect to his qualifications, conduct, fitness to perform or the performance of his official duties. Prior to initiating any such investigation, the commission shall file as part of its record a written complaint, signed by the administrator of the commission, which complaint shall serve as the basis for such investigation.

3. In the course of an investigation, the commission may require the appearance of the judge involved before it, in which event the judge shall be notified in writing of his required appearance, either personally, at least three days prior to such appearance, or by certified mail, return receipt requested, at least five days prior to such appearance. In

either case a copy of the complaint shall be served upon the judge at the time of such notification. The judge shall have the right to be represented by counsel during any and all stages of the investigation in which his appearance is required and to present evidentiary data and material relevant to the complaint. A transcript shall be made and kept with respect to all proceedings at which testimony or statements under oath of any party or witness shall be taken, and the transcript of the judge's testimony shall be made available to the judge without cost. Such transcript shall be confidential except as otherwise permitted by section forty-five of this article.

4. If in the course of an investigation, the commission determines that a hearing is warranted it shall direct that a formal written complaint signed and verified by the administrator be drawn and served upon the judge involved, either personally or by certified mail, return receipt requested. The judge shall file a written answer to the complaint with the commission within twenty days of such service. If, upon receipt of the answer, or upon expiration of the time to answer, the commission shall direct that a hearing be held with respect to the complaint, the judge involved shall be notified in writing of the date of the hearing either personally, at least twenty days prior thereto, or by certified mail, return receipt requested, at least twenty-two days prior thereto. Upon the written request of the judge, the commission shall, at least five days prior to the hearing or any adjourned date thereof, make available to the judge without cost copies of all documents which the commission intends to present at such hearing and any written statements made by witnesses who will be called to give testimony by the commission. The commission shall, in any case, make available to the judge at least five days prior to the hearing or any adjourned date thereof any exculpatory evidentiary data and material relevant to the complaint. The failure of the commission to timely furnish any documents, statements and/or exculpatory evidentiary data and material provided for herein shall not affect the validity of any proceedings before the commission provided that such

failure is not substantially prejudicial to the judge. The complainant may be notified of the hearing and unless he shall be subpoenaed as a witness by the judge, his presence thereat shall be within the discretion of the commission. The hearing shall not be public unless the judge involved shall so demand in writing. At the hearing the commission may take the testimony of witnesses and receive evidentiary data and material relevant to the complaint. The judge shall have the right to be represented by counsel during any and all stages of the hearing and shall have the right to call and cross-examine witnesses and present evidentiary data and material relevant to the complaint. A transcript of the proceedings and of the testimony of witnesses at the hearing shall be taken and kept with the records of the commission.

5. Subject to the approval of the commission, the administrator and the judge may agree on a statement of facts and may stipulate in writing that the hearing shall be waived. In such a case, the commission shall make its determination upon the pleadings and the agreed statement of facts.

6. If, after a formal written complaint has been served pursuant to subdivision four of this section, or during the course of or after a hearing, the commission determines that no further action is necessary, the complaint shall be dismissed and the complainant and the judge shall be so notified in writing.

7. After a hearing, the commission may determine that a judge be admonished, censured, removed or retired. The commission shall transmit its written determination, together with its findings of fact and conclusions of law and the record of the proceedings upon which its determination is based, to the chief judge of the court of appeals who shall cause a copy thereof to be served either personally or by certified mail, return receipt requested, on the judge involved. Upon completion of service, the determination of the commission, its findings and conclusions and the record of its proceedings shall be made public and shall be made available for public inspection at the principal office of the commission and at the office of the clerk of the court of ap-

peals. The judge involved may either accept the determination of the commission or make written request to the chief judge, within thirty days after receipt of such determination, for a review thereof by the court of appeals. If the commission has determined that a judge be admonished or censured, and if the judge accepts such determination or fails to request a review thereof by the court of appeals, the commission shall thereupon admonish or censure him in accordance with its findings. If the commission has determined that a judge be removed or retired, and if the judge accepts such determination or fails to request a review thereof by the court of appeals, the court of appeals shall thereupon order his removal or retirement in accordance with the findings of the commission.

8. (a) The court of appeals may suspend a judge or justice from exercising the powers of his office while there is pending a determination by the commission for his removal or retirement, or while he is charged in this state with a felony by an indictment or an information filed pursuant to section six of article one of the constitution. The suspension shall continue upon conviction and, if the conviction becomes final, he shall be removed from office. The suspension shall be terminated upon reversal of the conviction and dismissal of the accusatory instrument.

(b) Upon the recommendation of the commission or on its own motion, the court may suspend a judge or justice from office when he is charged with a crime punishable as a felony under the laws of this state, or any other crime which involves moral turpitude. The suspension shall continue upon conviction and, if the conviction becomes final, he shall be removed from office. The suspension shall be terminated upon reversal of the conviction and dismissal of the accusatory instrument.

(c) A judge or justice who is suspended from office by the court shall receive his judicial salary during such period of suspension, unless the court directs otherwise. If the court has so directed and such suspension is thereafter terminated, the court may direct that he shall be paid his salary for such period of suspension.

(d) Nothing in this subdivision shall prevent the commission from determining that a judge or justice be admonished, censured, removed, or retired pursuant to subdivision seven of this section.

9. In its review of a determination of the commission, the court of appeals shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based. After such review, the court may accept or reject the determined sanction; impose a different sanction including admonition, censure, removal or retirement for the reasons set forth in subdivision one of this section; or impose no sanction.

10. If during the course of or after an investigation or hearing, the commission determines that the complaint or any allegation thereof warrants action, other than in accordance with the provisions of subdivisions seven and eight of this section, within the powers of: (a) a person having administrative jurisdiction over the judge involved in the complaint or; (b) an appellate division of the supreme court; or (c) a presiding justice of an appellate division of the supreme court; or (d) the chief judge of the court of appeals; or (e) the governor; or (f) an applicable district attorney's office or other prosecuting agency, the commission shall refer such complaint or the appropriate allegations thereof and any evidence or material related thereto to such person, agency or court for such action as may be deemed proper or necessary.

11. The commission shall notify the complainant of its disposition of the complaint.

Added L. 1978, c. 156, § 1.

§ 45. Confidentiality of records

Except as hereinafter provided, all complaints, correspondence, commission proceedings and transcripts thereof, other papers and data and records of the commission shall be confidential and shall not be made available to any person except pursuant to section forty-four of this article. The commission and its designated staff personnel shall

have access to confidential material in the performance of their powers and duties. If the judge who is the subject of a complaint so requests in writing, copies of the complaint, the transcripts of hearings by the commission thereon, if any, and the dispositive action of the commission with respect to the complaint, such copies with any reference to the identity of any person who did not participate at any such hearing suitably deleted therefrom, except the subject judge or complainant, shall be made available for inspection and copying to the public, or to any person, agency or body designated by such judge.

Added L. 1978, c. 156, § 1.

§ 46. Breach of confidentiality of commission information

1. Any staff member, employee or agent of the state commission on judicial conduct who violates any of the provisions of section forty-five of this article shall be subject to a reprimand, a fine, suspension or removal by the commission.

2. Within ten days after the commission has acquired knowledge that a staff member, employee or agent of the commission has or may have breached the provisions of section forty-five of this article, written charges against such staff member, employee or agent shall be prepared and signed by the chairman of the commission and filed with the commission. Within five days after receipt of charges, the commission shall determine, by a vote of the majority of all the members of the commission, whether probable cause for such charges exists. If such determination is affirmative, within five days thereafter a written statement specifying the charges in detail and outlining his rights under this section shall be forwarded to the accused staff member, employee or agent by certified mail. The commission may suspend the staff member, employee or agent, with or without pay, pending the final determination of the charges. Within ten days after receipt of the statement of charges, the staff member, employee or agent shall notify the commission in writing whether he desires a hear-

ing on the charges. The failure of the staff member, employee or agent to notify the commission of his desire to have a hearing within such period of time shall be deemed a waiver of the right to a hearing. If the hearing has been waived, the commission shall proceed, within ten days after such waiver, by a vote of a majority of all the members of such commission, to determine the charges and fix the penalty or punishment, if any, to be imposed as hereinafter provided.

3. Upon receipt of a request for a hearing, the commission shall schedule a hearing, to be held at the commission offices, within twenty days after receipt of the request therefor, and shall immediately notify in writing the staff member, employee or agent of the time and place thereof.

4. The commission shall have the power to establish necessary rules and procedures for the conduct of hearings under this section. Such rules shall not require compliance with technical rules of evidence. All such hearings shall be held before a hearing panel composed of three members of the commission selected by the commission. Each hearing shall be conducted by the chairman of the panel who shall be selected by the panel. The staff member, employee or agent shall have a reasonable opportunity to defend himself and to testify on his own behalf. He shall also have the right to be represented by counsel, to subpoena witnesses and to cross-examine witnesses. All testimony taken shall be under oath which the chairman of the panel is hereby authorized to administer. A record of the proceedings shall be made and a copy of the transcript of the hearing shall, upon written request, be furnished without charge to the staff member, employee or agent involved.

5. Within five days after the conclusion of a hearing, the panel shall forward a report of the hearing, including its findings and recommendations, including its recommendations as to penalty or punishment, if one is warranted, to the commission and to the accused staff member, employee or agent. Within ten days after receipt of such report the commission shall determine whether it shall implement the recommendations of the panel. If the commission shall

determine to implement such recommendations, which shall include the penalty or punishment, if any, of a reprimand, a fine, suspension for a fixed time without pay or dismissal, it shall do so within five days after such determination. If the charges against the staff member, employee or agent are dismissed, he shall be restored to his position with full pay for any period of suspension without pay and the charges shall be expunged from his record.

6. The accused staff member, employee or agent may seek review of the determination of the commission by way of a special proceeding pursuant to article seventy-eight of the civil practice law and rules.

Added L. 1978, c. 156, § 1.

§ 47. Resignation not to divest commission or court of appeals of jurisdiction

The jurisdiction of the court of appeals and the commission pursuant to this article shall continue notwithstanding that a judge resigns from office after a determination of the commission that the judge be removed from office has been transmitted to the chief judge of the court of appeals, or in any case in which the commission's determination that a judge should be removed from office shall be transmitted to the chief judge of the court of appeals within one hundred twenty days after receipt by the chief administrator of the courts of the resignation of such judge. Any determination by the court of appeals that a judge who has resigned should be removed from office shall render such judge ineligible to hold any other judicial office. The chief administrator of the courts shall give written notice to the commission of the resignation of any judge who is the subject of an investigation within five days after his receipt thereof.

Added L. 1978, c. 156, § 1.

§ 48. Courts on the judiciary; former commission on judicial conduct; jurisdiction and powers

Notwithstanding any other law to the contrary: 1. If a court on the judiciary shall have been convened before the

first day of April, nineteen hundred seventy-eight, and the proceeding therein shall not have been concluded by that date, the court on the judiciary shall have continuing jurisdiction beyond that date to conclude the proceeding in accordance with the provisions of section twenty-two of article six of the constitution in effect on the thirty-first day of March, nineteen hundred seventy-eight.

2. If, pursuant to the former provisions of section twenty-two of article six of the constitution and article two-A of the judiciary law, a complaint had been received by the former commission on judicial conduct but a court on the judiciary had not been convened in respect to such matter on or before the thirty-first day of March, nineteen hundred seventy-eight, a court on the judiciary shall not be convened, and the provisions of section twenty-two of article six of the constitution, as such section took effect on the first day of April, nineteen hundred seventy-eight, and the provisions of this article shall apply.

3. All matters pending before the former commission on judicial conduct on the thirty-first day of March, nineteen hundred seventy-eight, shall be transferred to and, effective the first day of April, nineteen hundred seventy-eight, shall be pending before the commission on judicial conduct established by section twenty-two of article six of the constitution, as such section took effect on the first day of April, nineteen hundred seventy-eight, and all files and records of the former commission shall be transferred to, and shall become files and records of the new commission created by this article from and after the first day of April, nineteen hundred seventy-eight.

4. All provisions of law enacted to take effect on or after the first day of April, nineteen hundred seventy-eight, relating to procedures before the commission on judicial conduct established by section twenty-two of article six of the constitution, as such section took effect on the first day of April, nineteen hundred seventy-eight, and all rules adopted by such commission, shall apply to (1) all matters coming before the commission on or after the first day of April, nineteen hundred seventy-eight, and (2) all matters

transferred to such commission pursuant to subdivision three of this section.

5. The commission shall succeed to the exercise of all of the functions, powers and duties of the former commission on judicial conduct including the power to continue any investigation, proceeding or matter pending undetermined before such former commission pursuant to the former provisions of article two-A of this chapter and the power to act as counsel to conduct any proceeding before a court on the judiciary, pursuant to the former provisions of subdivision f of section twenty-two of article six of the constitution, provided, however, that any recommendation or determination by the commission in any matter pending undetermined before such former commission shall be made in accordance with the provisions of this article.

6. Any action taken, function performed or proceeding conducted by the commission on judicial conduct pursuant to the authority of section twenty-two of article six of the constitution, as such section took effect on the first day of April nineteen hundred seventy-eight, prior to the date on which the provisions of this article became effective, are hereby legalized, ratified and confirmed.

Added L. 1978, c. 156, § 1.

APPENDIX "10"
NEW YORK STATE JUDICIARY LAW, SECTION 43, SUBD. 2, AS IN EFFECT ON MAY 25, 1977

§ 43. Complaint, investigation, hearing and disposition

1. The commission shall receive a complaint against any judge with respect to his qualifications, conduct, fitness to perform, or the performance of his official duties. A complaint shall be in writing and signed by the complainant and if directed by the commission shall be verified. Upon receipt of a complaint (a) the commission shall conduct an investigation of the complaint; or (b) the commission may dismiss the complaint if it determines that the complaint on its face lacks merit. If the complaint is dismissed, the commission shall so notify the complainant. If the commission shall have required the appearance of the judge involved before it, the commission shall also notify the judge of such dismissal.

2. The commission may, on its own motion, initiate an investigation of a judge with respect to his qualifications, conduct, fitness to perform or the performance of his official duties. Prior to initiating any such investigation, the commission shall file as part of its record a written complaint, signed by the administrator of the commission, which complaint shall serve as the basis for such investigation.

3. In the course of an investigation, the commission may require the appearance of the judge involved before it, in which event the judge shall be notified in writing of his required appearance either personally at least three days prior to such appearance or by certified mail, return receipt requested, at least five days prior to such appearance and a copy of the complaint shall be served upon the judge at the

time of such notification. The judge shall have the right to be represented by counsel during any and all stages of the investigation at which his appearance is required and to present evidentiary data and material relevant to the complaint. A transcript shall be made and kept with respect to *

Supreme Court, U. S.
FILED
SEP 25 1980
MICHAEL RODAK, JR., CLERK

No. 80-116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANGELO DARRIGO,

Appellant,

v.

STATE COMMISSION ON JUDICIAL CONDUCT, the HON. MRS. GENE ROBB, CHAIRPERSON, the HON. GERALD STERN, ADMINISTRATOR, and the HON. FRANCIS L. VALENTE, JR., REFEREE, and THE SEVERAL OTHER MEMBERS OF THE NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT AS IT CURRENTLY EXISTS PURSUANT TO THE CONSTITUTION OF THE STATE OF NEW YORK, ART. 6, SECT. 22, AND THE JUDICIARY LAW OF THE STATE OF NEW YORK, SECTS. 40-48,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

MOTION TO DISMISS APPEAL OR AFFIRM ORDER APPEALED FROM

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Of Counsel:
RAYMOND S. HACK
SETH A. HALPERN

Question Presented

Whether the appellant's claims with respect to the provisions of the New York State Constitution and Judiciary Law prescribing the procedures for the investigation, prosecution and adjudication of complaints alleging misconduct of judges, present a substantial federal question meriting review by this Court.

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IN THE

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ANGELO DARRIGO,

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STATE COMMISSION ON JUDICIAL CONDUCT, the HON. MRS. GENE ROBB, CHAIRPERSON, the HON. GERALD STERN, ADMINISTRATOR, and the HON. FRANCIS L. VALENTE, JR., REFEREE, and THE SEVERAL OTHER MEMBERS OF THE NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT AS IT CURRENTLY EXISTS PURSUANT TO THE CONSTITUTION OF THE STATE OF NEW YORK, ART. 6, SECT. 22, AND THE JUDICIARY LAW OF THE STATE OF NEW YORK, SECTS. 40-48,

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

MOTION TO DISMISS APPEAL OR AFFIRM ORDER APPEALED FROM

Preliminary Statement

The appellees, State Commission on Judicial Conduct, et al. ("Commission") make this motion, pursuant to Rule 16 of this Court, to dismiss the appeal taken by Angelo Darrigo ("appellant") from the order of the Appellate Division, First Department, entered March 20, 1980 (Jur.St.

2a*), unanimously affirming the judgment of the Supreme Court, New York County, entered July 3, 1979 (Jur.St 10a-12a); or, in the alternative, to affirm the order of the Appellate Division, First Department.

Parties

A list of the parties to the proceeding in the Appellate Division, First Department, is contained in the full caption of this case and has been set forth separately in appellant's jurisdictional statement (Jur.St. 2, fn. 1).

Opinions Below

The opinion of the Appellate Division, First Department, dated March 20, 1980, upon which the order appealed from is based, is officially reported at 74 A.D.2d 801 (1st Dep't 1980) but has not yet been reported unofficially. At this writing, none of the other opinions rendered in the courts below have been reported either officially or unofficially. However, the opinion of the Supreme Court, New York County, dated March 24, 1979, upon which its judgment was based, is printed in the New York Law Journal, June 7, 1979, p. 10, col. 3 (Sup.Ct.N.Y.Co.). The opinion of the Appellate Division, First Department, referred to above, unanimously affirming the judgment of the Supreme Court, New York County, is printed in the New York Law Journal, March 24, 1980, p. 7, col. 3 (App. Div. 1st Dep't). The decision of the Court of Appeals, denying appellant's motion for permission to appeal and dismissing his appeal taken as of right for want of a substantial constitutional question, is printed in the New York Law Journal, July 8, 1980, p. 6, col. 2 (Ct. of Appeals).

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* References preceded by the designation "Jur.St." are to pages of appellant's jurisdictional statement.

Jurisdiction

We respectfully submit that this Court lacks jurisdiction to entertain the instant appeal under 28 USC § 1257, because appellant has failed to demonstrate that the order appealed from was necessarily based upon a federal ground. *E.g., Stembridge* v. *Georgia,* 343 U.S. 541 (1952). Thus, the unanimous affirmance by the Appellate Division, First Department, of the judgment of the Supreme Court, New York County, dismissing appellant's Article 78 petition, may have reflected a determination by the First Department that the federal constitutional claims asserted by appellant against the Commission on that appeal were inappropriately or prematurely raised, in view of appellant's right under New York Constitution Article 6, § 22(a) to ultimate review of any final Commission decision in his pending disciplinary case by the New York Court of Appeals. *E.g. Jerry* v. *Board of Education,* 35 N.Y.2d 534, 544-545, 364 N.Y.S.2d 440 (1974); *YMCA* v. *Pure Waters District,* 37 N.Y.2d 371, 372 N.Y.S.2d 633 (1971). Certainly, the Appellate Division made no explicit ruling on the constitutional issues. Moreover, the Court of Appeals subsequently dismissed the appeal, purportedly taken as of right by appellant on constittuional grounds from the Appellate Division order under CPLR 5601(b)(1), "upon the ground that no substantial constitutional question is directly involved" (Jur.St. 14a). Under these circumstances the order appealed from may well have rested on an adequate nonfederal ground and this appeal should accordingly be dismissed for lack of jurisdiction.

Provisions Involved

The provisions generally relevant to this case include New York State Constitution, Article 6, § 22 (McKinney's vol. 2, Supp. 1979-80) and New York Judiciary Law, Article

2-A, §§ 40-48 (McKinney's vol. 29, Supp. 1979-80). These provisions are reproduced in their entirety in the appendices to appellant's jurisdictional statement (Jur.St. 17a-36a).

Facts

Introduction: The Role of the Commission

The Commission is a judicial disciplinary body with authority, under Article 6, § 22(a) of the New York State Constitution, to "receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system."

The Commission is the descendant of the Temporary State Commission on Judicial Conduct, which was created in 1974 as a temporary agency with a view to becoming a permanent, constitutional body. The purpose of establishing the Temporary Commission was to provide a means for review of complaints against judges by the public.

The Temporary Commission was succeeded on September 1, 1976, by the former Commission, by virtue of a state constitutional amendment approved by the New York State electorate in November 1975. On April 1, 1978, pursuant to a second amendment to the New York Constitution (approved by the state's electorate in November 1977), the current Commission came into being. The latter amendment re-established an 11-member Commission (composed of four judges, five attorneys and two lay persons), broadened the scope of the Commission's authority and streamlined the procedure for disciplining judges within the state's unified court system.

As empowered by New York Constitution Article 6, § 22 and Judiciary Law §§ 40-48, the present Commission may:

> receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to per-

> form or performance of official duties of any judge or justice in the unified court system, in the manner provided by law; and, in accordance with subdivision d of this section, may determine that a judge or justice be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office, persistent failure to perform his duties, habitual intemperance, and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge or justice be retired for mental or physical disability preventing the proper performance of his judicial duties.
>
> N.Y. Const. Art. 6, § 22(a)

The Commission is authorized to receive written, signed complaints from members of the public. Upon receipt of such a complaint, the Commission may conduct an investigation of the complaint or dismiss the complaint (Judiciary Law § 44[1]).

The Commission may also initiate its own investigation of a judge, upon the filing of an "Administrator's Complaint:"

> The Commission may, on its own motion, initiate an investigation of a judge with respect to his qualifications, conduct, fitness to perform or the performance of his official duties. Prior to initiating any such investigation, the Commission shall file as part of its record a written complaint, signed by the administrator of the Commission ["Administrator's Complaint"], which complaint shall serve as the basis for such investigation.
>
> Judiciary Law § 44(2)

The Commission has power to administer oaths, subpoena witnesses, require the production of any books, records, documents or other evidence, confer immunity and require the appearance of a judge before it to give sworn testimony in an investigation (Judiciary Law §§ 42, 44[3]).

If the Commission finds that a hearing on formal charges is warranted, it may authorize a "Formal Written Complaint" (Judiciary Law §44[4]). Following an Answer by the judge an adversary evidentiary hearing on the Formal Written Complaint is then held. That hearing may be held before a referee designated to hear and report (Judiciary Law §43[2]).

After a hearing, the Commission may dismiss the complaint or may determine that a judge be admonished, censured, removed or retired. If the Commission imposes a sanction on a judge, he has a right to a review of the determination on the law and the facts by the New York Court of Appeals, the highest court of the state court system (New York Constitution Article 6, §§22[a], [d]; Judiciary Law §§44[7], [9]).

The Commission's Investigation of Appellant and the Subsequent Disciplinary Proceeding

Appellant is a lawyer and Town Justice in Newburgh, New York. The possibility that appellant had engaged in judicial misconduct first came to the Commission's attention in early 1977. The Commission staff, while examining public records in a justice court other than appellant's (during an ongoing investigation of alleged misconduct by another judge), discovered the following letter, dated September 8, 1975, written by appellant on his official stationery, addressed to the "Presiding Justice" of that justice court and requesting special consideration or favored treatment on behalf of a defendant whose case was then pending therein:

> Dear Judge:
>
> Enclosed please find summons #E853345 issued to my neighbor, Joseph A. Catania, 37 Meadow Street, Newburgh, New York.
>
> You will note that he has signed the summons on the back wherein he pleads Guilty to the charge.

Please advise what disposition you require and it will be mailed to you forthwith.

However, I would appreciate any consideration that you can give to my neighbor.

Very truly yours,
/s/
Angelo Darrigo
(Rec. 103*)

As a result, the Commission, pursuant to former Judiciary Law §43(2) (now §44[2]), directed Gerald Stern, the Commission's Administrator, to file an Administrator's Complaint, dated April 22, 1977, to serve as the basis for an investigation (Rec. 182, 185, 227-29, 244-46, 281-84). The Adminstrator's Complaint read in pertinent part:

> Judge Darrigo wrote a letter on his official stationery on September 8, 1975, to Judge Walter Gersten of Thompson Town Court. He sought consideration on the disposal of a traffic ticket to a defendant (Joseph Catania) who was his neighbor. The letter was intended to influence Judge Gersten in the disposition of this case on the basis of personal consideration. It was in breach of Sections 33.2(b)(c) and 33.3(a)(4) of the Rules of the Administrative Board of the Judicial Conference of the State of New York.
>
> (Rec. 182)

Further investigation, consisting primarily of examination of public records in appellant's and other courts, revealed a number of other cases in which appellant sought special consideration on behalf of defendants in traffic cases pending before other judges; in which his own dis-

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* References preceded by the designation "Rec." are to pages of the Record on Appeal in the Appellate Division, First Department.

position of traffic cases was influenced by similar *ex parte* requests from third parties; or in which he granted favorable dispositions to clients, former clients or their relatives (Rec. 76-78). Two letters were subsequently sent by Mr. Stern to appellant, enclosing documents relating to these cases and requesting his explanation of his role therein (Rec. 105, 110-11). Appellant answered these letters and volved (Rec. 106-09, 112-15).

On June 12, 1978, the Commission, exercising its authority under Judiciary Law § 44(3), sent a letter to appellant requesting his investigative appearance before a member of the Commission on June 28, 1978, at the Commission's New York City office.* Appellant was asked to give testimony concerning his alleged role in 39 cases including the *Catania* matter (Rec. 116-20).

Appellant failed to appear on June 28, 1978 (Rec. 123-25). Nor did he appear on July 18 or July 27, 1978, pursuant to further requests for his appearance (Rec. 129-31, 82). No written explanation for the failure to attend was ever given by appellant (Rec. 82).

On September 20, 1978, appellant was served with a Formal Written Complaint, pursuant to Judiciary Law § 44(4), formally charging him with failing to appear before the Commission and failing to reply to the Commission's request for a written explanation of his failure to appear (Rec. 135-39). Appellant's Answer was received on October 6, 1978 (Rec. 140-43).

---

* Judiciary Law § 44(3) states in pertinent part:

> In the course of an investigation, the Commission may require the appearance of the judge involved before it, in which event the judge shall be notified in writing of his required appearance, either personally, at least three days prior to such appearance, or by certified mail, return receipt requested, at least five days prior to such appearance. In either case a copy of the complaint shall be served upon the judge at the time of such notification.

On November 16, 1978, pursuant to Judiciary Law § 43(2), the Honorable Francis L. Valente, Jr., was appointed as referee for the fact finding hearing (Rec. 220). The hearing took place on December 20, 1978, and February 9, 1979 (Rec. 221-357). No determination has yet been made by the Commission concerning the allegations of the Formal Written Complaint.

The Proceedings in Supreme Court, New York County

By order to show cause, dated February 7, 1979, appellant brought a proceeding in Supreme Court, New York County under Article 78 of the New York Civil Practice Law and Rules, in which he sought, on various state statutory and federal constitutional grounds, an order prohibiting the Commission from "taking any further actions" against him and declaring unconstitutional Judiciary Law §§ 40-48 (Rec. 19-38). Appellant's initial application for an interim stay of the pending disciplinary proceedings was denied (Rec. 20).

By notice of motion, dated February 15, 1979, the Commission moved to dismiss appellant's Article 78 petition (Rec. 72-89). On February 21, 1979, appellant served a "cross-notice of motion" to amend his petition (Rec. 149-80), and on February 23, 1979, he made a new motion for an interim stay of the disciplinary proceedings (Rec. 382-87).

In its decision dated May 24, 1979, the Supreme Court upheld the constitutionality of the Commission's combination of investigative, prosecutorial and adjudicatory functions as well as its statutory procedures for initiating an investigation, filing formal disciplinary charges and referring fact-finding hearings to a referee. The Court also refused to prohibit the disciplinary proceedings pending against appellant under Judiciary Law § 44(4). However, relying on state decisional law interpreting Judiciary Law § 44(2), the Court conditionally prohibited the Com-

mission from examining appellant, in the course of its original, underlying investigation, with respect to any of the 38 named matters that, unlike the *Catania* matter, were not specifically enumerated in the existing Administrator's Complaint; but the Court further held that "should the Commission find, on the basis of information in its files, that additional complaints are warranted, it may, of course, file such a complaint in accordance with the procedures provided in Judiciary Law Sec. 44(2)" (Rec. 17-18).

The Judgment

The judgment of the Supreme Court, entered July 3, 1979, denied appellant's motion to stay the ongoing disciplinary proceedings pending resolution of his lawsuit; dismissed his Article 78 petition insofar as it sought prohibition of those proceedings or a declaration of the unconstitutionality of the Commission's state constitutional and legislative authority; and prohibited the Commission from undertaking any further investigation of appellant as to specific matters for which no Administrator's Complant had yet been filed under Judiciary Law § 44(2) or for which no private complaint had yet been received under Judiciary Law § 44(1), unless and until the Commission received or filed additional complaints covering such matters (Jur.St. 10a-12a).

The Proceedings on Appeal

Appellant appealed to the Appellate Division, First Department, from so much of the judgment as dismissed in part his Article 78 proceeding (Rec. 3). The Commission cross-appealed from so much of the judgment as prohibited it from investigating specific matters pertaining to appellant for which it had received or filed no additional complaint pursuant to Judiciary Law §§ 44(1) or (2) (Rec. 5-6).

The Appellate Division, First Department, in an opinion and order dated March 20, 1980, unanimously affirmed the judgment (Jur.St. 1a-3a).

Appellant subsequently sought to appeal that decision to the New York Court of Appeals, by filing a notice of appeal as of right as to the constitutional grounds asserted and seeking leave to appeal as to the remainder of his claims. His motion in the Appellate Division, First Department, for permission to appeal, was denied by order of that Court, entered April 29, 1980 (Jur.St. 13a). The Court of Appeals denied a similar motion by appellant by order entered July 3, 1980 (Jur.St. 14a). In the same order, the Court of Appeals granted a cross-motion by the Commission to dismiss the appeal previously taken by appellant as of right, on the ground that no substantial constitutional question was directly involved (Jur.St. 14a). Appellant thereupon filed a notice of appeal to this Court dated July 8, 1980 (Jur.St. 15a).

ARGUMENT

I. The Appeal Fails to Present a Substantial Federal Question Meriting Review by this Court

Introduction: The Nature of the Appeal

Appellant seeks a determination of unconstitutionality of various provisions of the New York Constitution and Judiciary Law relating to the power vested in the Commission and the procedures authorized for the conduct of its work. These provisions, he claims, violate his Fourteenth Amendment right to due process of law and other guarantees under the United States Constitution.

In particular, he attacks the Commission, as created, because of its unified structure with respect to investigation, prosecution and determination; the absence of specified, statutory standards for the bringing of formal writ-

ten charges; the absence of specified, statutory standards for the initiation of an investigation; and the provision for designation of a referee to hear and report to the Commission. In effect, the claim is that the people of the State of New York, in creating this particular Commission, with the power and authority vested in it, contravened the United States Constitution. The Courts below uniformly rejected the argument, for, as shown herein, it is patently insubstantial. It is, indeed, unworthy of further scrutiny by this Court, for which reason we respectfully submit that the present appeal should be dismissed in all respects or, in the alternative, that the order of the court below be affirmed.

The Unified Structure of the Commission

Appellant begins his attack with an assault on Article 6, § 22(a) of the New York Constitution which creates the Commission and empowers it to receive, initiate, investigate and hear complaints and determine that a judge be disciplined.

It is that embodiment of investigative, prosecutorial and adjudicative functions in a single agency, as prescribed by the constitutional mandate, which, according to appellant, is inherently violative of due process of law. However, as the discussion in his jurisdictional statement reveals, and as the Courts below recognized, this Court has held exactly the contrary: an authorization of investigative, prosecutorial and determinative functions to be performed by a single administrative agency is not in violation of due process of law. *Withrow* v. *Larkin,* 421 U.S. 35, 47-58 (1975) (medical disciplinary proceeding); *Friedman* v. *State of New York,* 24 N.Y.2d 528, 544, 301 N.Y.S.2d 484 (1969), *app. dism'd,* 397 U.S. 317 (1970) (judicial disciplinary proceeding); *Matter of Del Rio,* 400 Mich. 665, 690, 256 N.W.2d 727 (1977), *app. dism'd,* 434 U.S. 1029 (1978) (judicial disciplinary proceeding). *See also, Halleck* v. *Berliner,* 427 F. Supp. 1225, 1243-4

(D.D.C. 1977) (judicial disciplinary proceeding) and cases cited therein; *Matter of Sarisohn,* 21 N.Y.2d 36, 48, 286 N.Y.S.2d 255 (1967) (judicial disciplinary proceeding). Thus, this Court has consistently ruled that "[t]he mere exposure to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness of [administrative agency] members at a later adversary hearing." *Withrow* v. *Larkin, supra,* 421 U.S., at 55. Accord, *Hortonville J.S.D. No. 1* v. *Hortonville Ed. Ass'n,* 426 U.S. 482, 493 (1976) (teacher disciplinary proceeding); *F.T.C.* v. *Cement Institute,* 333 U.S. 683, 700-703 (1948) (proceeding on price setting). Consequently, before a state agency will be forestalled from pursuing its mandate, the complaining party must support the due process claim with a concrete showing of actual bias on the part of the agency members whose action is being challenged. *Withrow, supra; Hortonville, supra; Halleck, supra.* For, "[w]ithout a showing to the contrary, state administrators 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances'" *Withrow, supra,* 421 U.S., at 55. At no time in the course of this litigation has appellant demonstrated or even alleged a scintilla of actual bias on the part of the Commission.

Nor, for that matter, has appellant set forth any compelling reason why this Court should now depart from existing precedent or disregard the comprehensive procedural safeguards, contained in the Commission's legislation, that were manifestly designed to insure against even the possibility of such prejudice. These safeguards include, for example, the right of a judge to have counsel present at an investigative appearance and to receive a free copy of the transcript of that proceeding (Judiciary Law § 44[3]); the right to an adversary evidentiary hearing on disputed facts and to extensive discovery in advance thereof (§ 44[4]); the right, pursuant to Commis-

sion rule, to submit a brief and present oral argument to the Commission itself with respect to a referee's report and the issue of sanction (22 NYCRR § 7000.7[a]); and, if the Commission does determine a sanction, the right, provided by both the State Constitution (Art. 6, §§ 22[a], [d]) and the Judiciary Law (§§ 44[7], [9]) to have that determination reviewed in the Court of Appeals, which must review on the record the Commission's findings of fact and conclusions of law and may make its own determination. *See, Matter of Spector,* 47 N.Y.2d 462, 418 N.Y.S.2d 385 (1979).

It should be noted that this Court has twice in the past considered constitutional challenges to the combination of functions of the former Court on the Judiciary.* Thus, in *Friedman* v. *Court on Judiciary,* 375 U.S. 10 (1963), this Court dismissed an appeal, taken on that and other grounds from a determination of the Court on the Judiciary, for want of a substantial federal question. Similarly, in *Friedman* v. *State of New York,* 24 N.Y.2d 528 (1969), *app. dism'd,* 397 U.S. 317 (1970), this Court dismissed, for the same reason, an appeal from a decision of the New York Court of Appeals which explicitly upheld against due process challenge the combination of functions of the Court on the Judiciary. The Court of Appeals had stated:

> The Court on the Judiciary is a court of record (Judiciary Law, § 2) whose jurisdiction is strictly limited to removing or retiring a Judge or Justice and disqualifying a Judge or Justice removed from again holding any public office in this State (New York Constitution, Art VI, § 22). To this extent the Court on the Judiciary sits to supervise the conduct of the

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* The Court on the Judiciary had state constitutional authority to remove judges for "cause" or to retire them for disability, from 1947 until 1978, when its jurisdiction was abolished pursuant to an amendment to New York Constitution, Article 6, § 22.

> members of the Judiciary of this State, and like an administrative agency which may remove an employee for cause, where a combination of functions is traditional, so too that combination of functions may, consonant with due process, exist in the Court on the Judiciary.
>
> *Id.*, at 544

Appellant's argument is thus singularly unpersuasive. Particularly inapposite is his reliance on *Matter of Murchison,* 349 U.S. 133 (1955), which reliance was expressly rejected both by the New York Court of Appeals in *Friedman, supra,* and later by this Court in *Withrow, supra.* The Commission obviously is not a "one-man grand jury" and does not base its disciplinary findings on the non-reviewable impressions of its members gained in isolated inquisitorial settings, but rather on record evidence sifted through the adversary process and subject to further judicial review. Investigation and prosecution of Commission cases are carried out by an Administrator and staff who are forbidden from giving aid or advice to the Commission with respect to the adjudication of any proceedings in which they have been involved in an investigative or prosecutorial capacity. *See,* 22 NYCRR §§ 7000.6(f)(3); 7000.7(b). The hearing itself is normally held before an impartial referee (Judiciary Law § 43[2]). All pleadings, all Commission findings and conclusions, all testimonial, documentary and other evidence which the Commission had before it in making a determination and, of course, the determination itself, are included in the Record for Review by the Court of Appeals, pursuant to rule of that Court. 22 NYCRR § 530.2.

In short, there is no foundation whatsover for any claim that the Commission prejudges facts or that its investigative, prosecutorial and adjudicative functions are so inextricably intertwined as to deny respondent judges their right to a fair hearing. The unified structure of the

Commission, as created by the New York Constitution and as implemented by the statute and rule, is therefore valid and entirely consonant with the constitutional standards of due process of law.*

Procedure for Filing Administrator's Complaint

Appellant claims that "in order to insure an independent Judiciary there should be at least some degree of legally required evidence to be submitted to the Commission" before it files an Administrator's Complaint pursuant to Judiciary Law §44(2) (formerly §43[2]), and that the absence of a specified statutory "standard of proof" renders the provision constitutionally defective (Jur.St. 31-32). This claim should likewise be rejected.

To begin with, appellant adduces no legal authority for the proposition that the filing (or receipt) of a preliminary investigative complaint must be conditioned upon the fulfillment of a prescribed evidentiary prerequisite and, indeed, we are aware of no agency in New York or elsewhere which imposes such a requirement. For example, the Judiciary Relations Committees of the First and Second Judicial Departments, which formerly investigated allegations of misconduct by lower court judges in New York, were simply authorized to "entertain" complaints, or to dismiss them on their face or following a preliminary

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* Appellant makes passing reference to a claim that the presence of lay members on the Commission denies him his Sixth Amendment right to counsel (Jur.St. 25, fn. 7). This assertion is based upon a misreading of *North* v. *Russell*, 427 U.S. 328 (1976), wherein this Court explicitly declined to decide the question "whether a defendant could be convicted and imprisoned after a proceeding in which the only trial afforded is conducted by a lay judge" (*Id.*, at 334)—circumstances obviously inapplicable here in any event. It should be noted that at least one state has explicitly held that the presence of lay members on a judicial disciplinary commission is consistent with due process. *See, McComb* v. *Commission on Judicial Performance*, 138 Cal. Rptr. 459, 464-5, 564 P.2d 1, 11-12 (1977).

investigation, as the Committees saw fit. 22 NYCRR §§ 607.6(b), (c) (First Department); §§ 704.7(a), (b) (Second Department). Similarly, a review of the rules of the various Appellate Divisions governing the conduct of attorneys reveals that while several provide for the receipt or filing of preliminary complaints, none sets burden of proof standards for the initiation of investigations. *See,* 22 NYCRR § 603.4(c) (First Department); § 691.4(c) (Second Department); § 806.4(a) (Third Department); § 1022.19(b) (Fourth Department). *See also, e.g.,* N.Y. Exec. Law § 297(1), (2) (State Division of Human Rights); N.Y. Pub. Health Law § 230.(10)(a) (State Board for Professional Medical Conduct). *And see,* 15 USCA § 78u(a) (Securities and Exchange Commission); 47 USCA § 208 (Federal Communications Commission); 16 CFR § 2.1 (Federal Trade Commission).

In any event, appellant's apparent contention that the Commission may not even initiate an investigation until it has acquired the information which only an investigation can uncover is patently ludicrous. No principle of law, constitutional or otherwise, justifies an absurdity which would make it impossible to conduct investigations and render § 44(2) entirely nugatory. Certainly, the cases relied on by appellant at pp. 31-32 of the jurisdictional statement are of little assistance, inasmuch as they merely reflect traditional judicial restraints on the subpoena power and plainly do not restrict the authority of agencies such as the Commission to take cognizance of and initiate investigations into allegations of misconduct, whether received from private citizens, published in the press or acquired in the course of separate investigations. In fact, the Administrator's Complaint filed in the instant case (Rec. 182) was based on a highly inculpatory letter obtained through inspection of public court records. Under such circumstances, appellant cannot seriously challenge the Commission's right to file an Administrator's Complaint and thereby commence an investigation into the matters.

Procedure for Instituting Formal Charges

Appellant's attack on Judiciary Law § 44(4)—on the ground that the provision lacks an express requirement that there exist "reasonable grounds to believe that judicial misconduct is taking place" or "probable cause," or "any of the other old bromides known to the law" (Jur.St. 43)—is equally without merit. Explicit statutory incorporation of such a standard has not been regarded as essential to due process, which requires only that "the charged party be fully and fairly apprised of the factual nature of the charges being made against it." *Div. of Human Rights* v. *Kilian Mfg. Corp.*, 42 A.D.2d 391, 393, 348 N.Y.S.2d 428 (4th Dep't 1973), *rev'd on other grounds*, 35 N.Y.2d 201, 360 N.Y.S.2d 603 (1974); *app. dism'd*, 420 U.S. 915 (1975); *Matthews* v. *Eldridge*, 424 U.S. 319, 348-9 (1976).

Indeed, it can be argued that such adequate notice will satisfy due process even where the charges when made are unsupported by any underlying proof. Thus, this Court has held in criminal cases that "[a]n indictment . . ., if valid on its face, is enough to call for trial of the charge on the merits." *Costello* v. *United States*, 350 U.S. 359, 363 (1956). *See also, Bracy* v. *United States*, 435 U.S. 1301, 1302 (1978) (Rehnquist, Cir.J.). If so, then surely, such proof need not be expressly required by statute.

Appellant has never disputed that the Formal Written Complaint served on him in this case gave clear and ample notice of the facts alleged. If true, those allegations constituted "cause" for discipline. *E.g., Friedman* v. *State of New York, supra; Sarisohn* v. *Appellate Division*, 265 F. Supp. 455, 458 (E.D.N.Y. 1967); *Matter of Osterman*, 13 N.Y.2d (1), (p)-(q) (Ct. on the Judiciary 1963). No more need be shown.

Authority to Designate a Referee

Appellant argues that New York Constitution Article 6, § 22(c), and Judiciary Law § 43(2), authorizing the Com-

mission to refer adversary evidentiary hearings under Judiciary Law § 44(4) to hear and report, violate due process "because the Referee is the one who observes the demeanor and composure of given witnesses, . . . yet, [his findings] may be disregarded completely [by the Commission]" (Jur.St. 33). That appellant's view has been rejected is evident from his reliance upon the dissents in *Matter of Waltemade,* 37 N.Y.2d (nn) (Ct. on the Judiciary 1975) and *Mildner* v. *Gullotta,* 405 F. Supp. 182 (E.D. N.Y. 1975), *aff'd,* 425 U.S. 901 (1976).

In *Waltemade, supra,* the Court on the Judiciary explicitly rejected the judge's contention that "this Court cannot sit in judgment on this case without having personally heard the evidence presented before the Referee." 37 N.Y. 2d at (oo)-(rr). The Court held it sufficient that "evidence be taken in a fair manner, with respondent having full opportunity to present his evidence and argument in opposition to the charges, and that the court review and consider such evidence before reaching its decision." *Id.,* at (pp).

In *Mildner, supra,* the United States District Court, in an analogous context, went further, stating:

> Nor, in our opinion, is it constitutionally required that the Appellate Division as final arbiter of the facts have personally heard the accused attorneys or other witnesses or have allowed oral argument upon the motions to confirm or disaffirm the referee's reports. The use of masters or referees as advisory triers-of-fact is well-established instrument of busy appellate courts exercising original jurisdiction. The Supreme Court itself utilizes the practice when disputed factual issues appear in original actions. R. Stern & E. Gressman, Supreme Court Practice, Sec. 10-12 at 407-08 (4th ed. 1969). Although oral argument to the Court is allowed on the master's report in such matters, id., this is not ordinarily the case in

disbarment proceedings. *See, In re Capshaw,* 65 S. Ct. 673 (1945), and 67 S. Ct. 1345 (1947); *In re Crow,* 359 U.S. 1007, 1008, 79 S. Ct. 1152, 3 L.Ed.2d 1025 (1959) (Douglas, J., dissenting opn.); Stern & Gressman, *supra,* Sec. 19.5.

405 F. Supp., at 195

This Court affirmed the judgment of the District Court. 425 U.S. 901. As noted, the use of referees to hear and report is hardly an innovation in the law. Utilization by the Commission of such a standard, traditional device designed to facilitate the adjudicative process can, under these circumstances, scarcely be deemed to violate appellant's constitutional rights.

Summary

In sum, the creation of a unified Commission, the procedure for initiating an investigation and a disciplinary proceeding, and the authority to designate a referee are fully consistent with the requirements of federal constitutional law.* Devoid of judicial authority, appellant's claims were rightly rejected by the courts below. His present appeal is plainly without basis and should accordingly be dismissed by this Court.

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* Appellant also contends that the Courts below erred in holding that the Commission could proceed with its underlying investigation if it filed a new Administrator's Complaint, pursuant to Judiciary Law § 44(2), based upon information in its files, and asks this Court to "formulate an exclusionary rule which would prohibit the Commission from using the fruits of an illegal investigation as the basis for filing new [investigative] complaints or formal written charges . . ." (Jur.St. 33-34). Appellant has made no showing whatsoever, and the record nowhere suggests, that any information regarding him was obtained by the Commission in violation of the Constitution or laws of the United States. Moreover, no hearing is even contemplated from which such information might be "excluded" in the future. His argument is entirely without basis and should be dismissed as frivolous.

Conclusion

The appeal should be dismissed in all respects. In the alternative, the order of the Appellate Division, First Department, entered March 20, 1980, from which the appeal is taken, should be affirmed. To the extent that this appeal may be treated as a petition for a writ of certiorari, the petition should be denied in all respects.

Respectfully submitted,

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Dated: New York, New York
September 19, 1980

Of Counsel:

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SUPREME COURT, U.S.
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NO. 80-116

IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

MATTER OF ANGELO DARRIGO,
Petitioner-Appellant,

-against-

STATE COMMISSION ON JUDICIAL CONDUCT, the HON. MRS. GENE ROBB, CHAIRPERSON, the HON. GERALD STERN, ADMINISTRATOR, and the HON. FRANCIS L. VALENTE, JR., REFEREE, and THE SEVERAL OTHER MEMBERS OF THE NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT AS IT CURRENTLY EXISTS PURSUANT TO THE CONSTITUTION OF THE STATE OF NEW YORK, ART. 6, SECT. 22, AND THE JUDICIARY LAW OF THE STATE OF NEW YORK, SECTS. 40-48,
Respondents-Appellees.

On Appeal from Appellate Division, Supreme Court of New York, First Judicial Department

A BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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Respondents-Appellees.

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

PRELIMINARY STATEMENT

This brief is submitted in opposition to the Respondents-Appellees motion to dismiss the appeal. It is

submitted that this Court has jurisdiction to hear and decide this appeal because the State Courts resolved the Petitioner's Article 78 proceeding on Federal Constitutional grounds. (Jur. St. 6a-7a).[1]

JURISDICTION

The Respondents-Appellees seek dismissal of this appeal claiming that the order appealed from was not necessarily based upon a federal ground. It is submitted that from the very inception of the Special Proceeding in the State Courts the Appellant sought a declaration that the subject legislation was unconstitutional by reason by the First, Fifth, Sixth and Fourteenth Amendments (Jur. St. 4a). It was upon those very specific grounds that the Justice at Trial Term ruled as is set forth in his opinion (Jur. St. 6a-7a). In addition, in order to hold this legislation to be constitutional Special Term relied upon decisions of this Court.

In their attempt to obtain a dismissal of this appeal the argument is pressed that the unanimous affirmance of the Appellate Division, First Department "may have" reflected a determination by that Court that the Federal Constitutional claims asserted were inappropriate or prematurely raised. (See p. 3 of motion to dismiss). The Court affirmed Special Term.

The argument of inappropriateness of the Special Proceeding in order to obtain a determination of unconstitutionality has been constantly made by the Respondents-Appellees. However, the law in New York is clear that a C.P.L.R. Article 78 Proceeding is an appropriate vehicle to attack the constitutionality of a statute. This principle was recently reaffirmed in *Watergate II Apartments v. Buffalo Sewer Authority* (46

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1. Designation "Jur. St." refers to pages of the Jurisdictional Statement.

NY2d 52) where the Court pointed out that while it is Hornbook law that one who objects to an act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a Court of Law, that is an inflexible rule and an agency can be challenged as being unconstitutional. (Id. 57) The Court at Special Term in reaching and deciding the constitutional questions presented relied upon that case.

This is a real controversy and it is the constitutionality or unconstitutionality of this legislation which will determine the fate of the Petitioner-Appellant. The legislation as pointed out in the jurisdictional statement is patently unconstitutional. The claims made by the Respondents-Appellees that this Court has in the past reviewed the questions presented and upheld the procedures which are attacked is an outright misstatement. In their motion to dismiss at page 14, it is claimed that "It should be noted that this Court has twice in the past considered constitutional challenges to the combination of functions of the former Court on the Judiciary." The cases of *Friedman v. The Court on the Judiciary* (375 US 10) and *Friedman v. The State of New York* (24 NY2d 528, app. dism. 397 US 317) are cited in support of that statement. The Respondents-Appellees failed to emphasize to this Court that the Court on the Judiciary which previously existed in New York has been done away with and all of the powers of that Court have now been incorporated and given to this Commission which can remove any Judge or Justice of the State of New York. It is the very reasoning which caused the Court of New York State to uphold the constitutionality of the former Court on the Judiciary which demonstrates that the current New York State Commission on Judicial Conduct consists of a combination of functions which is violative of due process.

In *Friedman v. The State of New York* (24 NY2d 528, app. dism., 397 US 317) a New York State Supreme Court

Justice argued that because the then existing Court on the Judiciary acted as complainant, prosecutor and Judge his rights to due process of law had been violated. In that case, the Respondent, Friedman, relied on this Court's case of *Matter of Murchison* (349 US 133). Obviously, after carefully looking to the law as set forth in *Murchison,* the New York State Court of Appeals upheld the existence of the former Court on the Judiciary pointing out that the Court on the Judiciary did not provide a procedure such as was condemned in *Murchison.* The doctrinal differences are clear. It was pointed out in *Friedman* that the right of cross examination was not lost because no member of the Court on the Judiciary could be called as a witness, for the members of that Court acted as Judges and not investigators. Under the current New York State Commission on Judicial Conduct the members of the Commission act as investigators and thus cross examination is lost. (See, *Matter of Richardson,* 247 NY 401 [Cardoza, Ch. J.]). A second ground used by the New York State Court of Appeals in *Friedman* to sustain the former Court on the Judiciary was to point out that "here the Court on the Judiciary was not the accusor, for it was the report of the Supreme Court Justice which served as the complaint." (p. 543) Under the current law the New York State Commission on Judicial Conduct is in fact the accusor, thus that distinction no longer exists. Furthermore, the New York State Court of Appeals in *Friedman* pointed out that the Court on the Judiciary could not be said to have had an interest in the outcome of a case before it because it "reviewed" the allegations in a complaint to ascertain whether or not a demurrer was in order. Once again, this distinction is no longer there, for the New York State Commission on Judicial Conduct is the entity that directs charges to be filed and does not merely review charges to determine whether or not they are sufficient in law. The Commission does in fact prejudge facts and does

not just look to see if certain factual contentions make out a *prima facie* charge. It was further pointed out in *Friedman* that formal charges are preferred by a complainant designated by the Court on the Judiciary, but that it could not be assumed that because the Court designated the attorneys to conduct the proceedings that that Court became so intimately as to deprive a party before it of an impartial tribunal.

Under the current composition of the New York State Commission on Judicial Conduct it is the entity which investigates, prefers charges, determines fact, determines law and imposes the penalty. The Administrator is not an independent man but one who serves at the will of the Commission. When the New York State Commission on Judicial Conduct is challenged the Administrator goes to Court on its behalf to defend all of its actions. It is indeed significant that the Administrator is appearing before this Court to uphold the existence of this Commission and that the Attorney General of the State of New York has declined to intervene. This entity and its Administrator are inextricably intertwined and their sole interest is in justifying any acts taken. The New York State Commission on Judicial Conduct is interested in the Administrator and the Administrator is interested in them.

In *Marshall v. Jerrico, Inc.* (__US__, 100 Sup. Ct. 1610) this Court recently reviewed the procedures provided for by the Fair Labor Standards Act concerning the collection of civil penalties and pointed out that indeed, justice must satisfy the appearance of justice. This Court did not follow, in that case, the actual bias standard applicable to Administrative hearings. It is submitted that the actual bias standard relied upon by the Respondents-Appellees is not the standard under which the New York State Commission on Judicial Conduct can exist. When this Commission exercises its disciplinary function it does not follow the standard it claims to this Court that it

should be held to. In *Matter of Walter C. Dunbar,* (N.Y.L.J., 8-2-79, p. 5 [Commission on Judicial Conduct]) the Commission on Judicial Conduct sustained certain charges against a Town Justice pointing out:

> "With respect to Charge 6 of the Formal Written Complaint, involving People v. Marty Butler and People v. Keith Paddock, respondent presided over both matters despite his participation in preparing the prosecution's case in both matters, and despite his admittedly being 'upset' by the pre-trial conduct of one of the defendants. By so presiding over these matters, respondent violated Section 33.3 (c)(1)(i) of the Rules Governing Judicial Conduct, which requires a judge to 'disqualify' himself in a proceeding in which his impartiality might reasonably be questioned, including . . . instances where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.' "

The real question presented by this appeal is whether or not this Court will hold that Judges and Justices subjected to disciplinary proceedings are entitled to appear before a forum which fails to comply with substantive and procedural due process requirements. It is clear that the New York State Commission on Judicial Conduct as currently constituted does not afford the process due to the Judges and Justices of the State of New York. It is a Commission which has engaged in outrageous tactics and has taken away the independence of Judges and Justices in this State. Nothing can be more telling of the manner in which it actually functions than is indicated in the *Monitoring* function set forth at pp. 18 through 21 of the Jurisdictional Statement.

The fact that after a penalty has been imposed a review may be sought to the New York State Court of Appeals does not eradicate the unconstitutional proceedings

to which a Judge or Justice has been subjected. Certainly, the Petitioner-Appellant's claim concerning the lack of due process could not be raised before the New York State Commission on Judicial Conduct. That Commission is not a Court and could not declare the legislation unconstitutional. It would be inappropriate for the Petitioner-Appellant to have raised his constitutional challenges to the New York State Commission on Judicial Conduct. These constitutional challenges not having been raised before the New York State Commission on Judicial Conduct would not have been preserved for review by the New York State Court of Appeals. The only procedural mechanism provided for challenging the constitutional existence of the New York State Commission on Judicial Conduct was by the within C.P.L.R. Article 78 Proceeding. The fact that all of the Appellate Courts in the State of New York have refused to decide this issue does not mean that this Court lacks jurisdiction over the question. The constitutional questions presented were raised in appropriate form and those questions were presented to all of the Courts in the State of New York. This case is now ripe for this Court to review the issues. (*Warth v. Seldin,* 422 US 490, 498-499; *Baker v. Carr,* 369 US 186, 204; *Simon v. Eastern Kentucky Welfare Rights Org.,* 426 US 26, 38).

As its footnote in page 20, the appellees state: "Moreover, no hearing is ever contemplated from which such information might be 'excluded' in the future." This statement is an outright lie. The Commission subsequent to the filing of this motion, served the appellant with those charges, which a hearing is scheduled to take place on, before a member of the Commission, on November 5, 1980. Such misstatements to this court are outrageous, but apparently standard.

CONCLUSION

THIS MATTER SHOULD BE SET DOWN FOR BRIEFING AND ORAL ARGUMENT.

Respectfully submitted,

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